PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T Florida,	)	
	)	Proceeding No. 19-187
Complainant,	)	
	)	Bureau ID No. EB-19-MD-006
v.	)	
	)	
FLORIDA POWER & LIGHT COMPANY,	)	
	)	
Respondent.	)	

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S BRIEF IN SUPPORT OF ITS ANSWER TO THE AMENDED COMPLAINT OF BELLSOUTH TELECOMMUNICATIONS, LLC, D/B/A AT&T FLORIDA

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I. EXECUTIVE SUMMARY

It was 1975. Gerald Ford was President of the United States. *Love Will Keep Us Together* by The Captain and Tennille ruled the AM radio airwaves. *Jaws* and *One Flew Over the Cuckoo's Nest* topped the box office. Mood rings, pet rocks and Rubix Cubes were everywhere. And as of January 1, 1975, Southern Bell Telephone and Telegraph Company – predecessor-in-interest to complainant, Bellsouth Telecommunications, LLC, d/b/a AT&T Florida ("AT&T")[1] – and respondent, Florida Power & Light Company ("FPL"),[2] entered into a Joint Use Agreement ("1975 JUA" or "Agreement") for the equitable sharing of the ownership costs of a mutually constructed and beneficial network of poles to serve their customers.

So equitable, in fact, was the 1975 JUA that a May 19, 1975 internal letter at Southern Bell declared a "major change in the new Contract" between it and FPL: "The principle of space recognition has been accepted by FP&L. The rental rate is based on percentage ownership reflecting space allocations of 47.4% for the Telephone Company and 52.6% for the Power Company, rather than the old reciprocal rate." Satisfied with the Agreement it had procured, from January 1, 1975 until 2018, AT&T engaged in business as usual with FPL under the 1975 JUA.

On March 5, 2018, FPL sent an invoice to AT&T in the principal sum of [redacted], which represented the net principal amount due for AT&T's ownership share of its occupancy on FPL's poles during the 2017 calendar year. AT&T did not pay that invoice.

On February 1, 2019, after nearly a year had passed with no payment on the previous invoice for the 2017 calendar year, FPL submitted another invoice to AT&T in the principal sum of [redacted], seeking payment for the ownership share due for AT&T's occupancy on FPL's

[1] AT&T is an incumbent local exchange carrier ("ILEC") that provides telecommunications and other services in Florida

[2] FPL is a Florida-based power utility company serving more than 5.0 million accounts, which translates to about 10 million people in Florida.

poles for the 2018 calendar year. AT&T did not pay that invoice. Significant interest on both invoices accrued daily. In fact, the last time AT&T made a payment to compensate FPL for the use of its pole network was for the 2016 calendar year.

During the more than two year period AT&T unilaterally refused to pay its share of the joint use network ownership costs, AT&T never notified FPL in writing of allegations that formed the basis of a potential FCC complaint as required by 47 C.F.R. §1.722(g). AT&T merely repeatedly questioned the basis for FPL's calculation of the 1975 JUA rate, which AT&T already knew full well. It had successfully negotiated that rate back when Gerald Ford was President and people wore their mood rings on the way to watch *Jaws*.

AT&T's two-year period of unilateral non-payment effectively asked FPL's customers to bear AT&T's entire joint use ownership share of nearly [redacted]. Because of this, and because AT&T plainly breached the 1975 JUA by failing to make any payments on an almost [redacted] obligation for two years, on March 25, 2019, FPL exercised its rights under the 1975 JUA to (a) terminate AT&T's pole attachment rights as to its existing attachments; and (b) terminate the 1975 JUA as it applies to any future obligations of either party as to additional poles.

AT&T filed the present Complaint before the Federal Communications Commission ("Commission" or "FCC") against FPL on July 1, 2019. That same day, AT&T finally paid an amount to FPL equal to the severely delinquent outstanding principal balance due for the calendar years 2017 and 2018. For reasons known only to AT&T, the Complaint claimed AT&T had paid FPL the amounts owed under the 1975 JUA, expressly neglecting to inform the Commission that AT&T (1) had just delivered a payment in the form of two checks to FPL on that same morning and (2) had failed to pay the nearly [redacted] in interest it owed FPL for AT&T's use of FPL's [redacted] for two years. Probably for the same reasons, AT&T neglected to inform the

Commission that: (1) AT&T had never provided FPL the basis of its Complaint in writing; (2) AT&T had made very clear to FPL that AT&T was not attempting to renegotiate or change the contractual rates set forth in the 1975 JUA; (3) FPL had emphasized more than once that it was willing to negotiate a new attachment rate going forward; and, (4) FPL had offered multiple times over the past 5 years to purchase all of AT&T's poles and negotiate with AT&T what would effectively be rates, terms and conditions of attachments comparable to those of other telecommunications providers, but AT&T had never shown interest in FPL's proposal.

The Commission should dismiss or deny AT&T's Complaint. AT&T's pre-filing conduct should not be condoned. Its failure to abide by the requirements of 47 C.F.R. §1.722(g) and unilateral resort to [redacted] of self-help for more than two years warrant reprobation.

The substance of AT&T's Complaint is similarly without merit. The Commission's *2018 Third Report and Order* and that order's rebuttable presumption that AT&T is similarly situated to competitive telecommunications carriers do not apply retroactively to the 1975 JUA. That Agreement is a longstanding, valid and enforceable agreement that predates the *2018 Third Report and Order* by 43 years. Indeed, the *2018 Third Report and Order* itself makes clear that it only applies to "new" and "newly renewed" joint use agreements and that the Commission will not grant ILECs refunds as to existing contracts for the applicable limitations period predating the order. Both the law and the facts clearly preclude applying the *2018 Third Report and Order* to the 1975 JUA.

According to the Commission then, the framework of the *2011 Pole Attachment Order* applies to the parties' dispute over the 1975 JUA. That order, however, also should not be applied in this case, not only for the same reasons as above, but also because AT&T was not subject in 1975 and has not been subjected currently to any exertion of bargaining power, AT&T does not

lack the ability to terminate the 1975 JUA and obtain a more favorable agreement (indeed, it did not even try to do so) and there is no "significant disparity" between the respective joint use ownership shares each party pays the other.

Even assuming for the sake of argument that the Commission was to apply the *2011 Pole Attachment Order* to the 1975 JUA, the Complaint must be denied because the 1975 JUA rates are just and reasonable. The burden of proof under the *2011 Pole Attachment Order* is on AT&T and it comes nowhere close to meeting that burden. FPL, on the other hand, establishes by compelling evidence not only nearly twenty material net benefits and advantages AT&T receives under the 1975 JUA, but also quantifies those benefits and shows that their monetary value more than justifies the 1975 JUA rates. Indeed, FPL's voluntary grant of access to its infrastructure alone has extraordinary value to AT&T, worth at least over [redacted] in the avoided costs of building its own network. Despite the Commission's plain statement in the *Verizon v. FPL Decision* that Verzion provided "no evidence regarding the value of access" to FPL's poles, AT&T here wholly fails to provide evidence regarding the value of access.

In addition, AT&T's claim that its obligations as a pole owner cancel out any benefits under the 1975 JUA is specious. Not only has AT&T simply disregarded FPL's several proposals that would have allowed AT&T to sell all of its poles, because AT&T has chosen since approximately 1998 not to invest in its own pole network, the mathematical fact is that AT&T does not own enough poles to cancel out its benefits as an occupant on FPL's poles.

And, even though the rates to AT&T under the 1975 JUA are the appropriate and lawful rates in this case, a comparison of those rates to the properly calculated old telecom rate for AT&T from 2014-18 is telling. The old telecom rates for AT&T are higher than the 1975 JUA rates for AT&T in every year. If the old telecom formula were applied in this case to both parties'

attachments on a reciprocal basis, AT&T would owe FPL a net payment of [redacted] above and beyond the amounts invoiced under the 1975 JUA during that period.

Finally, even if despite all of the foregoing the Commission should evaluate the 1975 JUA under the *2018 Third Report and Order*, the 1975 JUA rates are just and reasonable. FPL has established by clear and convincing evidence that AT&T receives net benefits under the 1975 JUA that materially advantage AT&T over other telecommunications attachers, including all of the same benefits enumerated in the *2018 Third Report and Order* as well as many more. In addition, even if the old telecom rate were applied here as a "hard cap," AT&T would owe FPL far more than it has paid under the 1975 JUA.

For all of these reasons, as well as the affirmative defenses detailed in FPL's accompanying Answer, the Commission should dismiss or deny AT&T's Complaint. On a retrospective basis, the Commission should not review or disturb the terms of the January 1, 1975 Joint Use Agreement that AT&T proudly proclaimed included a major change in space allocation and percentage ownership that AT&T sought and was "accepted by FP&L." On a prospective basis, there is nothing for the Commission to do as FPL terminated AT&T's rights under the 1975 JUA.

II. BACKGROUND

A. Factual Background

1. The 1975 JUA.

On May 19, 1975, an internal letter at Southern Bell declared a "major change in the new Contract" between it and FPL: "**The principle of space recognition has been accepted by FP&L. The rental rate is based on percentage ownership reflecting space allocations of 47.4% for the Telephone Company and 52.6% for the Power Company, rather than the old reciprocal rate.**"[3] Southern Bell had successfully negotiated for itself a new— and lower— allocation of space ownership percentage and resulting potential payment.

The Ferris Letter referred, of course, to the same 1975 JUA between the parties at issue in this proceeding, entered into as of January 1, 1975.[4] The 1975 JUA had several rate-related provisions relevant here. First, the parties expressly agreed that FPL would be allocated "the uppermost 6 feet" of each joint use pole and Southern Bell would be allocated "a space of 4 feet . . . at sufficient height above the ground to provide proper vertical clearance for the lowest horizontally run wires or cables attached in such space."[5] Second, as the Ferris Letter highlighted, the parties specifically agreed to an allocation of space on the pole of 47.4% for Southern Bell and 52.6% for FPL.[6] In fact, what the parties defined as the "Objective Percentage" of allocated space in the 1975 JUA they also agreed would be the objective percentage of each party's total pole ownership under the 1975 JUA.[7] The party owning less than its "objective percentage" of poles was to compensate the other party.[8]

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[3] Declaration of Thomas J. Kennedy, attached as *Exhibit* A ("Kennedy Dec."), at ¶ 32, *citing* Letter from C.S. Ferris to Mr. J.M. Tinsley, dated May 19, 1975 ("Ferris Letter"), attached as *Exhibit* B to Kennedy Dec. (emphasis added).
[4] Complaint, *Exhibit* 1 (ATT 00109).
[5] *Id.*, § 1.17.
[6] *Id.*, § 1.1.19.
[7] *Id.*, §§ 4.3, 10.9.
[8] *Id.*, § 10.9.

Third, the parties also expressly agreed to a rate for the use of each other's joint use poles based on "the average annual cost of providing and maintaining the joint use poles of either party" and mechanisms to calculate that rate and pay it to the party owning the majority of the poles.[9] This "adjustment rate," therefore, would be used to calculate the rent owed by the party owning less than its "objective percentage" of the poles to the other. The amount to be paid would be the adjustment rate times the number of poles less than the "objective percentage" owned by the paying party.[10]

Fourth, the parties specifically agreed that "special poles"; *i.e.*, poles made of special materials such as concrete, steel or laminated wood,[11] would be "billed at 1.5 times the adjustment rate."[12] Finally, Southern Bell and FPL agreed that the rental rate and payment procedures under their new JUA would remain in place for at least five years.[13] The parties provided that: "The adjustment rate shall then become subject to renegotiation at the request of either party annually thereafter upon not less than six (6) months' prior notice."[14] If a request was made for renegotiation of the adjustment rate and it was not achieved within six months, the 1975 JUA would terminate.[15]

The 1975 JUA also specified an initial term for the parties' new agreement of five years, until January 1, 1980. After that, the 1975 JUA would continue in place unless and until one party provided the other six months written notice of termination.[16]

[9] *Id.*, §§ 10.6, 10.9.
[10] *Id.*, § 10.9.
[11] *Id.*, § 1.1.6.
[12] *Id.*, § 10.5.
[13] *Id.*, § 11.1.
[14] *Id.*
[15] *Id.*, § 11.2.
[16] *Id.*, Article XVI.

For the next 43 years and 3 months, the rate, space allocation, and pole ownership provisions of the 1975 JUA would remain in place, devoid of any record that the parties ever so much as discussed those provisions.[17]

2. The Parties' Course of Conduct under the 1975 JUA.

From January 1, 1975 until April 3, 2018, it was business as usual under the 1975 JUA. The only record of any negotiations or change regarding the 1975 JUA came in 2007, when the parties amended their agreement to provide, in pertinent part, only for certain storm related protocols and for a dispute resolution process.[18] In the 2007 Amendment, the parties provided: "The Parties acknowledge and agree that the terms and conditions of this Amendment have been freely and fairly negotiated."[19]

For a period of more than 43 years, there is no record of any changes or renegotiations between the parties regarding the 1975 JUA, other than the 2007 Amendment.[20] Indeed, there is no record of any relevant discussions of the 1975 JUA during this time, or even attempted changes or renegotiations regarding the relevant provisions of the agreement.[21] AT&T did not seek to change the space allocations, pole ownership split, or rate calculations.[22] AT&T did not seek to renegotiate the 1975 JUA.[23] And there is no record that AT&T sought to terminate the 1975 JUA or even that there were relevant disputes or complaints between the parties regarding the 1975 JUA.[24]

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[17] *See* Kennedy Dec., ¶ 33.
[18] Complaint, *Exhibit* 1 (ATT00135) (the "2007 Amendment").
[19] *Id.*, at 5 (ATT00139).
[20] *See* Kennedy Dec., ¶ 33.
[21] *See id.*
[22] *Id.*
[23] *Id.*
[24] *See id.*

There is, however, a record of a mutually satisfactory status quo. In fact, the record shows that AT&T over the years was quite mindful of the pole ownership ratio between the parties and its stated and agreed upon goal under the 1975 JUA to achieve an objective percentage ownership of 47.4 percent of the parties' joint use poles.[25] AT&T simply chose not to act to achieve its contractual objective.[26] Instead, beginning in 1998, AT&T actually allowed its pole ownership ratio to decline from a high of 44% to a low of 34% in 2018.[27] AT&T simply chose not to invest in its pole infrastructure.[28] In addition, AT&T has not sought to purchase any joint use poles from FPL for at least 24 years.[29] And for more than 43 years, AT&T regularly paid the joint use rental invoice provided it by FPL as calculated under the adjustment rate and payment provisions.[30]

3. The Parties' Pre-Complaint Discussions of the JUA Rates.

Historically, AT&T had promptly and timely paid FPL all adjustment charges due each year as required under the 1975 JUA up to and through the 2016 calendar year, charges which AT&T paid in early 2017. Unfortunately for FPL and its customers, this was the last payment FPL received from AT&T until the day AT&T filed its Complaint on July 1, 2019. In other words, AT&T benefitted from using FPL's poles for over two years without making any payments.

On March 5, 2018, FPL sent an invoice to AT&T in the principal sum of [redacted], which represented the net amount due for AT&T's attachments on FPL poles during the 2017 calendar year. AT&T did not timely pay that invoice. April 3, 2018 was the first date during the lifetime of the 1975 JUA that AT&T discussed the 1975 JUA rates with FPL.[31] And they did

[25] *Id.*, ¶ 34.
[26] *Id.*; Declaration of William P. Zarakas, attached as *Exhibit* B ("Zarakas Dec."), ¶¶ 5, 19.
[27] Kennedy Dec., ¶¶ 34–35.
[28] *Id.*, ¶ 33.
[29] *See id.*, ¶ 34.
[30] Declaration of David Bromley, attached as *Exhibit* C, at ¶ 6.
[31] *Id.*, ¶¶ 7–8.

just that—they "discussed" the rates. In a phone call between AT&T and FPL on April 3, 2018 and again on April 20, 2018, AT&T asked questions as to the calculations and financial data underlying the 1975 JUA rates.[32] So began AT&T's efforts to chip away at a more than four decades old business relationship.

Over the next several months, AT&T responded to FPL's repeated requests for payment by claiming it was going through a "vetting process" which required approval by several management levels. AT&T submitted several questions regarding the calculation of the rates under the terms of the JUA and FPL promptly responded each time.[33]

Months and months passed without AT&T paying FPL's joint use invoice. During that time, AT&T never provided FPL written notification of any specific allegations it had regarding the alleged unlawfulness of the 1975 JUA and/or rates.[34]

On August 21, 2018, 169 days after FPL submitted its invoice to AT&T for payment, AT&T made the general assertions that FPL had an obligation to charge AT&T a just and reasonable pole attachment rate and that AT&T believed it was entitled to the "new telecom rate" or, at worst, the "old telecom rate" or pre-existing telecom rate.[35] AT&T further asserted that the invoiced rates far exceeded the rates produced by the FCC's rate formulas. AT&T provided no details or explanations as to how it reached this conclusion.

AT&T also never requested that FPL renegotiate the 1975 JUA rates, provided any specifics as to what AT&T believed was a lawful rate, or even state how much AT&T believed it owed FPL for use of its joint use poles. AT&T did not ever provide such information in the parties'

[32] *Id.*
[33] *Id.*, ¶ 9.
[34] *Id.*, ¶ 10.
[35] *See* Complaint, *Exhibit* 5.

direct negotiations or at their mediation. It simply kept claiming that the 1975 JUA rate was unlawful and demanding that FPL justify the rate.[36]

During this time, FPL requested a face-to-face meeting with AT&T for the purpose of resolving the dispute over non-payment of the March 5, 2018, joint use invoice. During the parties' discussion, AT&T expressly stated that it was not seeking to renegotiate the 1975 JUA rate.[37] In the fifteen months of AT&T's non-payment of nearly [redacted], the most detail AT&T ever provided FPL regarding its position was from an August 21, 2018 e-mail stating the following:

> I am also concerned with the magnitude of the invoiced rates given FPL's obligation under the contract and the law of which I am aware to charge AT&T "just and reasonable" pole attachment rates. Article VI of the contract requires that the joint use of poles "at all times be in conformity with all applicable provisions of law" and federal law has long required that AT&T be charged a competitively neutral, just and reasonable rate. The FCC made that clear in its 2011 Pole Attachment Order and again earlier this month in its Third Report and Order. I trust you are aware that the FCC adopted a presumption that the just and reasonable rate for an ILEC like AT&T should be the new telecom rate, unless the power company can prove that the ILEC has some net material advantage over its competitors. We are aware of no such advantage, particularly since AT&T bears so many unique costs that disadvantage it relative to its competitors. But even if FPL were able to prove some net material advantage, the FCC set the pre-existing telecom rate as a "hard cap" on the rate that may be charged. The invoiced rates far exceed the rates produced by both FCC rate formulas.[38]

Indeed, a careful review of the complete record of the parties' exchanges, including all exhibits submitted by AT&T with its Complaint, shows that the August 21, 2018 email from Kyle Hitchcock to Thomas Kennedy is the closest AT&T ever came to providing written advance notification of the allegations that form the basis of its Complaint. And "closest" is a term applied loosely.[39]

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[36] Bromley Dec., ¶ 10–11.
[37] *Id.*, ¶ 12.
[38] Complaint, *Exhibit* 5.
[39] Bromley Dec., ¶ 10–11.

AT&T studiously avoided stating that it wanted to renegotiate the 1975 JUA rate. FPL's David Bromley memorialized this fact on December 20, 2018. "As stated in prior emails and at the meeting, if AT&T wants to re-negotiate the contract rate with FPL, the Agreement requires 6 months written notice. To date, FPL has not received such written notice and **AT&T indicated at the December 7 meeting that AT&T had not and was not initiating re-negotiation of the rate.** If AT&T does not want to renegotiate the rate, FPL must continue to rely upon the terms of the Agreement for calculating the rate."[40]

AT&T continued its refusal to provide specific details as to what it believed was the just and reasonable rate or what it believed was due for its occupancy of FPL's poles during the 2017 calendar year. Also, over the next several months, contrary to what the FCC had contemplated for pre-suit negotiations, AT&T never identified orally or in writing the specific underlying allegations that would support its conclusion that the contractual rates were not just and reasonable, that AT&T was comparably situated to its competitors, or that it was entitled to either the new or pre-existing telecom rate. Rather, as reflected in the attachments to the Complaint, AT&T continued to make general conclusory allegations and requested FPL to identify the steps it had taken to ensure compliance with federal law and its requirement for competitively neutral, just and reasonable rates.[41]

On February 1, 2019, after a year had passed with no payment on the previous invoice for the 2017 calendar year, FPL submitted another invoice in the principal sum of [redacted], seeking payment for the net rent due for AT&T's occupancy on FPL poles for the 2018 calendar year. In response, FPL received no payment or written objection from AT&T.[42] Moreover,

[40] *See* e-mail from David Bromley to Diane Miller, dated December 20, 2018, attached to Complaint as *Exhibit* 12 (ATT00197) (emphasis added).
[41] Bromley Dec., ¶ 11–12, 14; Complaint, *Exhibit* 8 (ATT00179).
[42] Bromley Dec., ¶ 13.

consistent with its conduct regarding the invoice for the 2017 calendar year, AT&T did not attempt to identify what it thought was due for its occupancy on the FPL poles during the 2018 calendar year. AT&T remained silent and continued to withhold all payments to FPL while it continued to enjoy the use and benefits of being attached to FPL poles.[43]

On July 1, 2019, AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance, absent interest, due for adjustment charges on the severely delinquent FPL invoices for the 2017 and 2018 calendar years.[44] This fact is conspicuously absent from the Complaint and excluded from the affidavit of Diane Miller, who stated that AT&T has processed payment on the 2014 through 2018 invoices that are the subject of the Complaint.[45]

Momentarily after it paid FPL the principal amount owed, AT&T filed the Complaint.

B. The Rates at Issue

The rates paid by AT&T to attach to FPL's distribution poles under the 1975 JUA during the years AT&T claims are at issue, 2014 to 2018, are as follows:

1975 JUA Rate	2014	2015	2016	2017	2018
Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

FPL fully establishes below that AT&T is not entitled to the "pre-existing telecom rate" or "old telecom rate," much less the "new telecom rate." For comparison purposes, however, the properly calculated old telecom rates for AT&T to attach to FPL's distribution poles are as follows for the years 2014 to 2018:

[43] *Id.*, ¶ 14.
[44] *Id.*, ¶ 15.
[45] *See* ATT00051– 00052.

Old Telecom Rate	2014	2015	2016	2017	2018
Rate per wood distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

The properly calculated old telecom rates, higher in every instance than the 1975 JUA rates, were calculated by FPL's highly experienced rates expert, Renae B. Deaton.[46] Ms. Deaton calculated the old telecom rates using input data for the FCC's formulas provided by joint use audits and a statistically reliable joint use survey performed by Alpine Communication Corp., FPL's longtime joint use and pole attachment field services consultant.[47] FPL's statistical expert, Ronald J. Davis, ensured that the survey Alpine performed was statistically reliable.[48] Notably, AT&T did not perform any such factual analyses, but instead leaned on the FCC's rebuttable presumptions, without any actual data, to perform its rate calculations.

Ultimately, FPL's joint use expert, Mr. Kennedy, reviewed, explained and applied the input data and rates provided from joint use field audits signed off by AT&T and declarations from Messrs. Davis and Murphy and Ms. Deaton to calculate the net payment owed by one party to the other if the old telecom rate is applied reciprocally for comparison purposes.[49] He concluded: "If AT&T and FPL each paid one another an attachment rate at the properly calculated pre-existing telecom rate for the years 2014-18, AT&T would owe FPL [redacted]."[50]

III. The Commission Should Not Condone AT&T's Pre-Filing Conduct

A. AT&T Failed to Engage in Executive Level Discussions as Required by Law.

[46] *See* Declaration of Renae B. Deaton, attached as *Exhibit* D ("Deaton Dec.").
[47] *See* Declaration of Robert Murphy, attached as *Exhibit* E, ¶¶ 1-3 ("Murphy Dec.).
[48] *See* Declaration of Ronald J. Davis, attached as *Exhibit* F ("Davis Dec.").
[49] Kennedy Dec., ¶¶ 28-31, 38.
[50] *Id.*, ¶ 38. This figure assumes that AT&T's argument regarding the applicable statute of limitations at five years is valid, a position with which FPL disagrees.

AT&T failed to fulfill its pre-filing regulatory obligations to provide FPL with the factual basis for its Complaint. AT&T's "good faith certification" to the contrary is knowingly misleading. AT&T's Complaint must therefore be dismissed. 47 C.F.R. §1.722(g) provides that:

> Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive-level discussions concerning the possibility of settlement. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, **the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time**. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice under the Act. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint. [emphasis added]

AT&T alleges that it "notified FPL in writing of the allegations that form the basis of this Complaint and invited a response within a reasonable time," and that the parties met to settle the dispute through a face-to-face executive-level meeting, which occurred on December 7, 2018.[51] However, the truth is that, in the fifteen months of non-payment of nearly [redacted], the most information that AT&T ever provided FPL regarding the basis of its claims came in an e-mail from FPL's Kyle Hitchcock, stating: "I am also concerned with the magnitude of the invoiced rates given FPL's obligation under the contract and the law of which I am aware to charge AT&T 'just and reasonable' pole attachment rates. . . . The invoiced rates far exceed the rates produced by both FCC rate formulas."[52]

[51] *See* Complaint, ¶7; Affidavit of Dianne Miller ("Miller Aff.") (ATT00054).
[52] Complaint, *Exhibit* 5.

The paucity of AT&T's written notice of allegations stands in stark contrast to the flood of allegations in the Complaint. For example, AT&T acknowledges that the Commission may decide that the correct application of the law requires that the *2011 Pole Attachment Order* governs the parties' dispute as to the 1975 JUA.[53] Indeed, AT&T devotes 7 pages and 11 paragraphs to allegations claimed to support its arguments under the *2011 Pole Attachment Order*.[54] Under that Order, AT&T must prove that "the rates established by the governing agreement between Florida Power and [AT&T's] predecessor are unjust and unreasonable [and] that [AT&T] is similarly situated to competitive local exchange carriers."[55]

AT&T's allegations in support of its arguments under the *2011 Pole Attachment Order* include the following:

- AT&T's calculations of the rates under the Agreement and the telecom rate formula show that the Agreement rate exceeds the applicable telecom rate.[56]

- The *current* (as compared to the ration in 1975 when the 1975 JUA was executed) pole ownership ratio between the parties shows that FPL exercised bargaining power over AT&T in connection with the Agreement.[57]

- AT&T lacks the ability to terminate the Agreement.[58]

- AT&T has been entitled to the new telecom rate since the *2011 Pole Attachment Order*.[59] Indeed, as to this last point, AT&T states: "FPL has also not challenged AT&T's conclusion that certain aspects of the JUA disadvantage AT&T as compared to its competitors. Any analysis of "competitive neutrality" must "account for . . . the different rights *and responsibilities.*"[60]

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[53] *See In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245); *A National Broadband Plan for Our Future* (GN 09-51), Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff'd, American Elec. Power Serv. Co. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) ("*2011 Pole Attachment Order*").
[54] Complaint, ¶¶ 20-30.
[55] *In the Matter of Verizon Fla. LLC, Complainant*, 30 F.C.C. Rcd. 1140, ¶ 23 (2015) ("*Verizon v. FPL Decision*").
[56] Complaint, ¶¶ 21–22.
[57] *Id.*, ¶ 23.
[58] *Id.*, ¶¶ 24–27.
[59] *Id.*, ¶¶ 28–30.
[60] *Id.*, ¶ 30 (internal citations and quotations omitted).

AT&T provided FPL no advance written notice of any of the above allegations.[61] FPL learned of them for the first time on July 1, at the same time as this Commission. Because of AT&T's failure to comply with Rule 1.722(g), FPL was deprived of the chance to review and understand AT&T's allegations which form the basis of the complaint, to respond fully and in writing to those allegations, and to engage in meaningful pre-complaint settlement discussions. AT&T engaged in a tactical plan to delay substantial payments to FPL for as long as possible without identifying the specific bases for its claim. This scheme allowed AT&T to unfairly: (1) enjoy the benefit of keeping in its coffers substantial payments that belonged to FPL for a substantial period of time;[62] and (2) place FPL at a severe disadvantage in defending this action, as FPL saw AT&T's allegations for the first time in the Complaint with no opportunity to discuss them with AT&T.

Indeed, while FPL's two invoices were left unpaid for a substantial period of time, AT&T never provided any written notice of the specific allegations that supported its basis for contending that the contractual rates were unjust and unreasonable. Moreover, AT&T never advised FPL of the amount it believed was due, or how it reached that calculation and tendered a good faith payment of a so-called "undisputed amount." Rather, AT&T withheld all payment on the general assertion that it did not understand how FPL calculated the applicable rates.[63]

[61] *See* Bromley Dec., ¶¶ 10, 13; Section III.A.3., *supra*.

[62] On July 1, 2019, the date AT&T filed this Complaint, FPL finally received an AT&T payment that was applied first against the large outstanding interest charges that had accumulated with the remaining balance applied against the two FPL invoices totaling almost [redacted] that was due for the calendar years of 2017 and 2018. At the time payment was finally delivered to FPL, the the interest charges on these two severely delinquent FPL invoices had accumulated in the total amount of [redacted]. AT&T employed these same tactics with Alabama Power Company, ignoring large invoices for a substantial period of time only to pay them right before filing its FCC Complaint. *See* Pole Attachment Complaint, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002 (filed Apr. 22, 2019). If AT&T is employing this tactic across the country, AT&T is prospering on bad faith tactics by utilizing the withholding of payments to leverage a settlement that should not be condoned by the FCC.

[63] *See* Bromley Dec., ¶¶ 7–14; Section III.A.3., *supra*.

Notwithstanding its clear obligation to provide FPL advance written notice of the allegations now set forth in the Complaint, AT&T simply requested that FPL justify to AT&T why the rates were just and reasonable, and did so only in response to FPL's queries regarding the status of AT&T's invoice payment. Thus, in lieu of fully informed settlement negotiations, FPL now must dedicate its resources to the formal complaint process. And so must the Commission.[64]

AT&T's conduct constitutes grounds for dismissing the Complaint. Although motions to dismiss are permitted only in rare circumstances, this should be one of those circumstances.

B. AT&T Misrepresented the Parties' Negotiations in its Amended Complaint.

As noted above, AT&T's Complaint affirmatively certifies that "AT&T notified FPL in writing of the allegations that form the basis of this Complaint and invited a response within a reasonable time," despite the fact that AT&T did no such thing.[65] However, this is only one of several gross mischaracterizations of the parties' negotiations contained in AT&T's Complaint. These ridiculous distortions of what actually transpired between the parties are neither necessary to address the issues raised by AT&T's Complaint nor helpful for the resolution of AT&T's various breaches of the parties' agreement.

For example, AT&T's Complaint assiduously fails to disclose the fact that AT&T refused to provide FPL with any compensation whatsoever under the 1975 JUA for two full calendar

[64] AT&T's pre-complaint filing discussions with and notice to FPL is even more deficient than AT&T's unacceptable level of pre-complaint filing discussions with and notice to Alabama Power and Light Company in AT&T's other recent Commission proceeding. See Pole Attachment Complaint, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002 (filed Apr. 22, 2019). There, Alabama Power and AT&T held two face-to-face meetings, which AT&T appeared to initiate, following AT&T's March 7, 2018 letter which first challenged the cost-sharing methodology partly forming the basis of AT&T's Complaint against Alabama Power. Id., Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, at 46, para. 31. Here, however, it was FPL, not AT&T, who sought to initiate meetings between the parties. The single meeting in which AT&T agreed to participate with FPL was designed to discuss, resolve and narrow issues surrounding rate calculations. In connection with FPL's attempts to meet, AT&T never proposed to discuss any of the issues which AT&T now alleges in its Complaint.

[65] Complaint, ¶ 7.

years' worth of rental payments. Thus, AT&T repeatedly characterizes FPL's fully justified actions to recoup the [redacted] owed to it by AT&T as "unwarranted operational restrictions . . . that appear designed to coerce AT&T into dropping its request for [negotiations]."[66] AT&T's nonpayment had a substantial effect. FPL's customer rates are established on the basis of (a) FPL paying for its ownership share of the 1975 JUA costs and (b) AT&T paying its ownership share. By AT&T unilaterally ceasing payment, it effectively asked FPL's customers to bear all of AT&T's ownership share. AT&T's implication that FPL's collection efforts were somehow linked to the parties' negotiations is simply not a good faith assertion. In a similar effort, AT&T also mischaracterizes FPL's collection efforts as evidence of FPL's superior bargaining power.[67] However, the fact that AT&T felt secure enough in its position relative to FPL to simply stop making payments under the parties' agreement puts the lie to any notion that it lacks bargaining power *vis à vis* FPL. AT&T knows that its pre-filing self-help and refusal to meet its obligations under the 1975 JUA were unlawful. That is why it artfully drafted its Complaint to conceal these facts from the Commission.

In addition, AT&T's Complaint falsely claims that FPL refused to negotiate with respect to the 1975 JUA rate provisions.[68] On the contrary, AT&T was the party who refused to renegotiate the terms of the parties' agreement. FPL remained open during the parties' negotiations to discussing the terms of the 1975 JUA.[69] FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward. However, as noted above, AT&T never provided FPL with any of the allegations or arguments that form the basis of its

[66] Complaint, ¶ 27.
[67] *See e.g., id.* ¶¶ 17, 23.
[68] *See e.g., id.* ¶ 17; s*ee also id.* ¶ 27 ("FPL has not just refused to discuss just and reasonable rates . . . .").
[69] *See* ATT00197 (stating that "AT&T indicated at the December 7 meeting that AT&T had not and was not initiating re-negotiation of the rate. If AT&T does not want to renegotiate the rate, FPL must continue to rely upon the terms of the Agreement for calculating the rate."); Kennedy Dec., ¶¶ 30, 36; Bromley Dec., ¶¶ 10–14.

Complaint. In fact, AT&T never provided FPL with any sort of concrete proposal or specific objection to which FPL could respond. Instead, AT&T made several vague claims regarding entitlement to a "just and reasonable" rate without any suggestion as to what AT&T believed a "just and reasonable" rate to be —all while AT&T continued to stall and delay meeting its financial obligations under the 1975 JUA.

Similarly, AT&T's Complaint asserts that FPL "never rebutted the Commission's new telecom rate presumption."[70] However, FPL could not have addressed "the Commission's new telecom rate presumption" during the parties' negotiations because again AT&T never actually articulated what its specific objections to the 1975 JUA were. AT&T's assertion that FPL failed to challenge the various arguments in its Complaint[71] is absurd given that FPL was not aware that AT&T was making such arguments until it was served with a copy of AT&T's Complaint. Had AT&T actually conducted negotiations with FPL in good faith and attempted to resolve any differences between the parties, FPL would have presented AT&T with the same information successfully rebutting the presumption that it now presents to the Commission.

C. The Commission Should Not Condone AT&T's Use of Self-Help and Last Minute Payment.

AT&T has engaged in self-help and now, brazenly, seeks the Commission's blessing for its actions. AT&T stopped paying its contractual rates, forcing FPL to terminate the parties' agreement and to file suit in Florida state court to collect on past due invoices.[72] AT&T only paid its outstanding principal balance under the parties' agreement (absent accrued interest)

[70] Complaint ¶ 14.
[71] *See, e.g., id.*, ¶ 30.
[72] *Florida Power & Light Co. v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, No. 9:19-cv-81043-RLR (S.D. Fla. 2019), *removed from* Case. No. 502019 CA 008515XXXXMB (Fla. 15th Cir. Ct.).

immediately before it filed its Complaint with the Commission. AT&T's Complaint fails to acknowledge this fact.

In contrast to AT&T's unjustified breach of the parties' agreement, the proper remedy for an ILEC which believes it is paying unreasonable rates is to continue paying the disputed rates while simultaneously challenging them. The FCC correctly interpreted the Communications Act of 1934 (the "Act") before the United States Court of Appeals for the Eleventh Circuit: "[I]n the absence of an FCC adjudication, a cable company seeking pole access must pay the rate that the utility demands."[73]

If every ILEC followed AT&T's lead, electric utility customers would face increased rates on account of collection costs and lost revenue credits in the amount of the value of the rental payments illegally withheld. No industry could reasonably plan for the future if counterparties resorted to self-help rather than following agreed procedures. This is particularly true for regulated entities, such as FPL, whose rates are set based on projected revenues and expenses.

The FCC and the courts have found on many occasions that similar self-help nonpayment practices violate Sections 201(b), 203(c) and other provisions of the Act.[74] The U.S. District Court of Vermont held:

> The clear line of authority regarding rate disputes is that the customer may not resort to self-help; that is, the customer may not merely refuse payment of the disputed rate but must pay the rate then bring an action to determine the validity of the carrier's actions. In essence, the [customer] resorted to self-help by refusing to pay the disputed deposit and incurring the alleged lost profits.

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[73] Letter Brief of United States Department of Justice at 2, March 29, 1999, *Gulf Power Co. v. United States*, No. 98-2403 (11th Cir.). *See also Fiber Technologies Networks, LLC v. Duquesne Light Co.*, 18 FCC Rcd. 10628 (2003) (holding that complainant attacher would not suffer irreparable harm by paying alleged overcharges for pole attachment fees and then filing a complaint seeking a refund).

[74] *MGC Commc'ns, Inc.*, 14 FCC Rcd. 11647 (1999), *aff'd, MGC Commc'ns, Inc. v. AT&T Corp.*, Mem. Op. and Order, 15 FCC Rcd. 308 (1999); *Nat'l Commc'ns Ass'n v. AT&T*, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001); *MCI Telecomms. Corp.*, Mem. Op. and Order, 62 F.C.C. 2d 703 (1976); *Communique Telecomms, Inc. d/b/a LOGICALL*, Declaratory Ruling and Order, 10 FCC Rcd. 10399 (1995), *aff'd*, 14 FCC Rcd. 13635 (1999).

Level 3 v. Tel. Operating Co. of Vermont, LLC, 2011 WL 6291959 (D. Vt. Dec. 15, 2011). The Commission should not condone, let alone encourage, AT&T's unlawful self-help.

Ironically, AT&T showed as much disregard for the Commission as it did for its contract with FPL. In disregarding the appropriate course of good faith business conduct, AT&T became its own regulator. Given the fact that the parties' 1975 JUA is a privately negotiated agreement which predates any federal statute or regulation addressing utility pole attachments, no FCC guidance implies that AT&T was entitled to a particular rate or even to any relief at all under the circumstances. Despite this and without providing justification for its actions, AT&T simply stopped compensating FPL for the use of its infrastructure.

IV. The FCC's New Presumption Under the *2018 Order* Does Not Apply Retroactively to the 1975 JUA and Attachments Made Thereunder

The parties comprehensively negotiated the 1975 JUA in arms-length fashion, requiring compromise by both parties. The agreement contains many interlocking parts. It is a bargained-for package of mutual rights and obligations under which the parties operated successfully and amicably for 43 years regarding long-lived critical infrastructure assets that continue to provide the services contemplated by the parties when they negotiated the 1975 JUA. Selectively rewriting one aspect of it in favor of AT&T is unlawful and will negatively impact FPL and its electric customers.

A. The 1975 JUA is Valid and Enforceable and Longstanding, not a New or Newly Renewed Agreement.

The 1975 JUA became effective on January 1, 1975, and was last amended in 2007.[75] It is a valid contract that predates the *2018 Third Report and Order*[76] by 43 years. Acknowledging the

[75] Complaint ¶ 3.
[76] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705 (2018) ("*2018 Third Report and Order*").

existence of such agreements, in its *2018 Third Report and Order*, the Commission stated that it would not apply the Commission's new rebuttable presumption that incumbent LECs are "entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers," to agreements such as the 1975 JUA.[77] This provision of the *2018 Third Report and Order* by its express terms is limited to "new and newly-renewed agreements."[78] The *2018 Third Report and Order* provides that "the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements."[79] It further provides that "renewal includes agreements that are automatically renewed, extended, or placed in evergreen status."[80] The 1975 JUA does not meet any definition of "new" or "newly renewed." In March 2019, when the *2018 Third Report and Order* became effective, the agreement was two months into its forty-forth year.

Undaunted by the *2018 Third Report and Order*'s language, AT&T argues that the newly created presumption of the *2018 Third Report and Order* should apply to the instant dispute.[81] However, the only purported support for this assertion that AT&T provides is that although the "JUA's initial term expired on January 1, 1980," it has continued "in force thereafter," pursuant to its terms, until its recent termination by FPL resulting from AT&T's refusal to meet its financial obligations under the agreement.[82] Thus, AT&T argues that, because of an event that occurred in 1980, the parties' 1975 JUA is a "new or newly-renewed pole attachment agreement" and that therefore the *2018 Third Report and Order*'s new presumption should apply to this proceeding.[83] This absurd line of reasoning should be rejected by the Commission.

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[77] *Id.*, ¶ 126.
[78] *Id.*
[79] *Id.*, ¶ 127.
[80] *Id.*, n. 475.
[81] *See* Complaint ¶ 11.
[82] *Id.*
[83] AT&T's Complaint also alleges that FPL placed the 1975 JUA in evergreen status through its termination of the agreement. Compl. ¶ 12. However, this argument misrepresents the legal significance of FPL's action as it relates to AT&T's rights under the 1975 JUA. As to AT&T, the 1975 JUA is not in evergreen status; it is terminated. On

Moreover, applying the Commission's new presumption to a more than four decades-old agreement would completely subvert the Commission's stated intention to minimize the divergence from past practices for "privately-negotiated agreements"[84] and would contravene the judicially-imposed limits on the Commission's ability to apply retroactively new regulatory pronouncements to past behavior. Instead, the *2018 Third Report and Order* made clear that, until existing agreements are "renewed," the Commission's 2011 Order will govern.[85]

In addition to attempting to improperly apply the *2018 Third Report and Order*'s new presumptions to this proceeding, AT&T also seeks relief that the *2018 Third Report and Order* expressly prohibits. In its Complaint, AT&T asks that the Commission issue an order compelling FPL to "refund the [redacted] that AT&T has paid in excess of the just and reasonable rate."[86] In issuing the *2018 Third Report and Order*, however, the FCC expressly denied ILECs' request for "'the right to refunds for Complaint overpayments as far back as the statute of limitations allows.'"[87] Thus, AT&T's Complaint again disregards the plain language of the *2018 Third Report and Order* and requests a form of relief that the Commission expressly foreclosed.

B. FPL and its Customers Have Invested Heavily in Reliance on the Agreement to the Benefit of AT&T.

March 25, 2019, FPL exercised its rights under the 1975 JUA to both (a) terminate AT&T's pole attachment rights as to its existing attachments for non-payment; and (b) terminate the 1975 JUA as it applies to any future obligation of either party as to additional poles, effective August 25, 2019. In all events, the contractual language that AT&T mistakenly claims to be an "evergreen" clause is actually a perpetual license which no longer exists as to AT&T. "[N]otwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination." *See* Article XVI of the 1975 JUA, attached as *Exhibit* 1 to AT&T's Complaint. Article XVI of the 1975 JUA is, however, irrelevant here, because at the time of the termination of AT&T's rights under Article XVI, AT&T's rights to existing attachments had already been terminated under Article XII due to AT&T's defaults of non-payment.

[84] *2018 Third Report and Order*, ¶ 127.

[85] *Id.*, n. 478.

[86] Complaint, ¶ 32.

[87] *2018 Third Report and Order*, n. 478 (internal citation omitted).

AT&T's Complaint conveniently ignores forty-three years of the parties' economic history and commercial relationship. FPL has made substantial, necessary capital investments in setting joint use poles under the 1975 JUA. AT&T's payments under the 1975 JUA only partially offset the cost of those investments. FPL's payments in turn offset in part AT&T's cost of investments. To the extent this capital is not recovered through joint use rates, FPL's retail electric customers bear costs incurred for and on behalf of AT&T for building and maintaining a network of poles taller and stronger than FPL needed and would have built for itself.

These costs include capital, operating and maintenance as well as other carrying costs, including permitting costs, pre-inspection costs, make-ready costs, and post inspection costs.[88] Additionally, FPL had to obtain Rights of Way ("ROW") over real property. This involved multiple individual negotiations, contracts, land records research and recordings, with thousands of real property holders.[89] Specifically, due to the joint-use relationship AT&T enjoys (and continues to enjoy) the benefits of the following investments made by FPL:

1. To accommodate AT&T's needs, FPL installed poles ten feet taller than the poles it needs to supply its own customers. These taller poles must also be set deeper in the ground by one foot. These taller poles cost FPL substantially more money than an FPL electric pole required to serve FPL's own customers. FPL uses these taller poles specifically to accommodate AT&T's facilities as required under the Agreement.[90]
2. There are instances where an FPL pole has reached capacity on pole height or strength. Unlike most other attachers, FPL is required to incur the cost to make space available when AT&T needs it.[91]

[88] *See, e.g.*, Kennedy Dec., ¶¶ 7–27.
[89] *See id.*, ¶ 17.
[90] *See id.*, ¶¶ 7, 9.
[91] *See id.*, ¶¶ 9–11.

3. AT&T avoids make-ready expenses under the 1975 JUA by having a pole line built to suit its needs without contribution. With AT&T attaching to 3,000 new poles per year, this represents a major savings for AT&T.[92]
4. AT&T pays its joint use fee annually in arrears (in March of the year following the attachments). AT&T gets the advantage of time-value of its money during this billing period, which represents a substantial savings.[93]
5. When an FPL pole reaches end of life or when FPL is forced to relocate a joint use pole (*e.g.*, the Department of Transportation forces relocation of the pole for roadwork), FPL is responsible for replacing the pole without contribution from AT&T. In accordance with the 1975 JUA, the new replacement FPL pole must be built to accommodate AT&T's joint use attachments.[94]
6. Where the JUA provides for the exchange of payment for make-ready, AT&T is only charged direct construction costs plus overheads that are required for the work.[95]
7. The 1975 JUA requires the pole owner to obtain rights-of-way for the joint user, to the extent that they are able to obtain those rights. AT&T has benefitted from FPL obtaining those rights-of-way for AT&T. These rights-of-way cost FPL a great deal of time and expense, and save AT&T a great deal of time and expense (over [redacted]).[96]
8. The 1975 JUA requires the pole owner to change out a pole at the owner's cost under several circumstances to accommodate the joint user.[97]

[92] *See id.*, ¶ 10.
[93] *See id.*, ¶ 12.
[94] *See id.*, ¶ 14.
[95] *See id.*, ¶ 9.
[96] *See id.*, ¶ 17.
[97] *See id.*, ¶ 2.

9. In many cases, the addition of AT&T's attachments to an FPL pole adds significant load on the pole for design purposes. This is primarily driven by the increase in pole height and the girth of the AT&T cable. Per the 1975 JUA, FPL is required to accommodate an increase in capacity without a contribution in aid of construction. With FPL's FPSC approved construction standards, this additional load requires FPL to set stronger concrete poles at FPL's significant expense.[98]
10. When FPL builds a new transmission line over an existing distribution pole owned by either company, AT&T, at AT&T's option, may relocate to a new pole line and require FPL to pay for one half of the construction of an equivalent pole line to accommodate AT&T facilities.[99]

In sum, FPL made the above investments and/or incurred the above costs to custom build AT&T a turn-key network of taller, stronger, and more easily accessible poles than FPL needed for its own use. FPL made these investments in reliance on the 1975 JUA and AT&T honoring its payment obligations under the agreement. For more that forty years, AT&T obviously recognized and chose to avoid the cost and burden associated with increased pole ownership and determined that it made more business sense for AT&T not to own as many poles as it agreed it would. FPL's burden was balanced under the terms of the carefully crafted 1975 JUA by the payments that AT&T agreed to make over time pursuant to the Agreement. This exchange of benefits, expenditures and payments made over time goes to the heart of the bargain that AT&T now seeks to simply cast aside.

[98] *See id.*, ¶ 25.
[99] *See id.*, ¶ 27.

In fact, in the case of AT&T, it is true that AT&T provides significantly *more* services today— such as "triple plays"— than when it originally attached its lines to FPL poles and therefore earns significantly more revenue proportionate to each joint use attachment.[100]

Now, after FPL has for several decades expended its own capital on these poles in reliance on the 1975 JUA, AT&T seeks to have the FCC declare a rate that ignores the economic and contractual realities of the parties' historical relationship, the benefits it received and continues to receive and the expenses incurred by FPL. The FCC should decline to do so as AT&T requests and instead should enforce the parties' contractual agreement for the existing attachments.

Should the FCC exercise jurisdiction over this matter, nullify the Agreement and determine a new rate as proposed by AT&T, FPL's utility accounts will reflect a corresponding reduction in the offset to its revenue requirement. As a result, in the absence of AT&T's fair contribution and all other factors remaining equal, FPL customers will be required to pay for the costs caused by AT&T.

Simply put, each dollar of joint use compensation received or recognized results in a one-dollar decrease in FPL customers' retail revenue requirement. This is required by the Florida Public Service Commission ("PSC") pursuant to Order No. 8721, Docket No. 780326-PU, at 2 (Feb. 16, 1979) ("The revenues that a utility receives from renting pole space to cable television operators must be taken into account by the Public Service Commission in fixing utility rates. Pole attachment revenues are properly used to offset the utility costs that are reflected in the rates paid by utility customers.") (quoting *GTE v. NY PSC*, 406 N.Y.S.2d 909, 911-12 (1978)). Forcing FPL ratepayers to pay for AT&T's unpaid bills is even more unjust and unfair when one recognizes that the ratepayers will be paying for infrastructure built for AT&T's benefit.

[100] *See* AT&T Bundles, https://www.att.com/bundles/ (last visited Sept. 9, 2019).

The Supreme Court has precluded the FCC from applying its new regulatory interpretation in such an arbitrary and capricious manner.[101] Rewriting the Agreement to allow AT&T to escape its financial commitment would involve "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule . . . ." *Bowen*, 488 U.S. at 220. FPL installed taller and stronger poles for AT&T, poles which were paid for through FPL electric rates with the reasonable expectation under then-existing rules that the pole costs incurred for AT&T would be recouped through joint use revenues.

The Commission should reject the result sought by AT&T, thereby reaching a decision consistent with applicable precedent that respects parties' investments in relation to application of the Commission's rules. For example, in *Nat'l Ass'n of Indep. Television Producers & Distribs. v. FCC*, 502 F.2d 249, 253-54 (2d Cir. 1974), the court invalidated and delayed the implementation of the Commission's rules that gave only eight months' notice of a rule change because television companies had already invested with substantial reliance on the previous rule.[102]

C. The FCC's New Regulatory Pronouncements Regarding ILECs Do Not Apply Retroactively to the Agreement and Attachments Made Thereunder.

In a fashion that suggests it is simply for negotiating purposes, AT&T urges the FCC to determine that the *2018 Third Report and Order* applies retroactively, giving the FCC the right to essentially re-write the parties' existing 1975 JUA. Aside from colliding with the plain language of the *2018 Third Report and Order* and well-established law, that proposition defies common sense in the context of this four decades-old agreement.

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[101] *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Miller v. United States*, 294 U.S. 435, 439 (1935) ("The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears.").

[102] *Compare New York Tel. Co. v. FCC*, 631 F.2d 1059, 1067-68 (2d Cir. 1980) (giving retroactive effect to the Commission's order requiring the telephone company to file tariffs with the Commission only because the telephone company had not relied greatly on prior relevant rulings by the Commission regarding the subject).

Supreme Court jurisprudence is clear that an administrative agency cannot take retroactive action, except in extraordinary circumstances, none of which are present here. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[103] "By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[104] "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."[105] "The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[106]

The FCC's statutory authority to regulate pole attachments, containing not a hint of retroactivity, is the foundation for the *2018 Third Report and Order*. It states in pertinent part:

> Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders.

[103] *Bowen*, 488 U.S. at 208; s*ee also Miller*, 294 U.S. at 439.
[104] *Bowen*, 488 U.S. at 208.
[105] *Id.* (internal citations omitted) (citing *Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It may reasonably exist in cases where the particular rate has been approved by the Commission after full hearing: it ought not to be extended so as to permit unreasonably harsh action without very plain words.") (quotations in original).
[106] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

47 U.S.C. § 224(b)(1). Nothing in this statute gives the FCC the ability to legislate or adjudicate retroactively. There is no "express statutory grant" to allow the FCC to do so.[107] Accordingly, the *2018 Third Report and Order* cannot apply retroactively.[108]

Recognizing that retroactive application is disfavored—if not unconstitutional—the Commission fashioned its order to state explicitly that the new pole attachment presumption should be applied only to "pole attachment contracts entered into or renewed after the effective date of this section."[109] Just the opposite pronouncement would be required before the rules be construed to have retroactive effect, particularly in the as-applied circumstances of the instant proceeding.

In addition, "[a] rule that has unreasonable secondary retroactivity—for example, altering future regulation in **a manner that makes worthless substantial past investment incurred in reliance upon the prior rule**—may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. § 706, and thus invalid."[110] FPL has made, as detailed above, substantial and decades long investments in pole plant to accommodate AT&T in reliance under the parties' joint use agreement.[111] FPL had no reason to construct its pole plant with additional capacity for any attachments beyond its own absent its obligations under the JUA.[112] This additional capacity is worthless to FPL without the benefit of the 1975 JUA's guarantee of proper compensation for any cost differential between the parties.

However, the *2018 Third Report and Order*'s "hard cap" (*i.e.*, the prohibition of a rate higher than the Commission's preexisting telecom rate even in situations where an electric utility has proven that the ILEC gains access to its poles on terms and conditions that materially

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[107] *See Miller*, *supra*.
[108] It makes no difference whether the FCC could have regulated ILEC rates prospectively subsequent to the 1996 Act; the statute itself does not expressly authorize retroactive effect.
[109] 47 C.F.R. § 1.1413.
[110] *Bowen*, 488 U.S. at 220 (emphasis added).
[111] *See* Kennedy Dec., ¶¶ 7, 9; Section IV.B, *supra*.
[112] *Id.*

advantage it vis-à-vis CATV and CLEC licensees) would result in FPL recovering less than its incrementals cost attributable to AT&T, a result that would cause the additional investment, strength, and capacity that FPL provided for AT&T over many decades to be worthless and in fact would constitute a direct transfer of wealth to AT&T. Indeed, the Commission stated that this was why it did not establish a rate or formula when it first asserted jurisdiction over this relationship in 2011.[113] Thus, if the Commission were to apply the *2018 Third Report and Order*'s new rate caps retroactively to the JUA, it would be an *ultra vires* act "that makes worthless substantial past investment incurred in reliance upon the prior rule."[114]

D. Constitutional Due Process Prohibits Applying Retroactive Rate Adjustments to the 1975JUA or Attachments Made Thereunder.

Legitimate due process concerns are a further and perhaps more significant impediment to AT&T's ambitious, but unsupported, application of the *2011 Pole Attachment Order* and *2018 Third Report and Order*. For example, in addressing whether the Commission's rules affecting rates are unlawfully applied in the pole attachment context such that the rule amounts to unlawful retroactive ratemaking, the United States Court of Appeals for the Eleventh Circuit has stated:

> A statute or administrative regulation does not operate retroactively merely because it applies to prior conduct; rather, a statute or regulation has retroactive effect if it 'would impair rights a party possessed when he acted, increase [his] liability for past conduct, or impose new duties with respect to transactions already completed.'[115]

In the present case, application of the *2018 Third Report and Order* so as to displace the mutually agreed upon rate under the parties' Agreement with the "new telecommunications rate" would impair FPL's rights under the JUA to receive the bargained-for rate and potentially expose FPL to

[113] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5333-34, ¶ 214 (noting the "complexities" in the joint use relationships between ILECs and electric utilities).
[114] *Bowen*, 488 U.S. at 220.
[115] *Georgia Power Co. v. Teleport Communications*, 346 F.3d 1033, 1042 (11th Cir. 2003) (quoting *Landgraf*, 511 U.S. at 280).

liability for refunds that FPL would not otherwise face. Accordingly, the relief requested would amount to unlawful retroactive ratemaking.

"The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application."[116] Thus, even assuming the *2018 Third Report and Order* applies on a going-forward basis, retroactive application of the Commission's new regulations to the JUA's rate provisions in the instant case would violate the Due Process Clause. Engaging in retroactive ratemaking as AT&T requests would deprive FPL of fair notice and disturb the settled rights of the parties under the 1975 JUA with respect to transactions that have already occurred. Therefore, the Commission cannot retroactively alter the rate applicable under the Agreement to attachments made thereunder.

V. The 1975 JUA Rates are Lawful Even if the *2011 Pole Attachment Order* Applies.

FPL has established that the *2018 Third Report and Order*'s rebuttable presumption and decisional framework do not apply retroactively to the 1975 JUA, which is not a "new" or "newly renewed" agreement. According to the Commission, the issues raised in the Complaint must therefore be decided under the analytical framework of the *2011 Pole Attachment Order*. "We recognize that this divergence from past practice will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements."[117] "Until that time, for existing agreements, the *2011 Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply."[118]

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[116] *Landgraf*, 511 U.S. at 253 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, (1976)).
[117] *2018 Third Report and Order*, ¶ 127 (internal citation omitted).
[118] *Id.*, n.478.

The issue before the Commission thus becomes whether the *2011 Pole Attachment Order* applies and the Commission should engage in a review of the 1975 JUA rates, terms and conditions. The answer is no. The 1975 JUA meets every indicia the Commission has identified as precluding such a review. The 1975 JUA is a longstanding historic agreement that predates the *2011 Pole Attachment Order* by decades, AT&T did not have inferior bargaining power to FPL either in 1975 or recently, AT&T does not lack the ability to terminate or renegotiate the agreement, and the 1975 JUA rates do not reflect a "significant disparity" between the per-pole rates AT&T pays and the per-pole rates FPL pays.

A. The Commission Should not Review the Terms of the 1975 JUA.

1. The 1975 JUA Long Predates the *2011 Pole Attachment Order* and is the Exact Type of Historic Agreement the *2011 Pole Attachment Order* Indicated the Commission Would not Disturb.

As noted above, the Agreement went into effect in 1975, and it was last amended in 2007.[119] It is a valid contract that predates the *2011 Pole Attachment Order* by more than three decades. As such, it would be unreasonable and far beyond the expectations of the Parties for the Agreement to be subjected to FCC review in this complaint proceeding. In the Commission's own words:

> Although some incumbent LECs express concerns about existing joint use agreements, these long standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership. As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. Consistent with

[119] Complaint, ¶ 3.

> the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable.[120]

"Nothing in the record suggests that **existing agreements** between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review."[121] "We decline to apply our new interpretation of section 224 retroactively . . . ."[122]

The FCC's Enforcement Bureau affirmed the limited scope of the *2011 Pole Attachment Order* in interpreting another of FPL's joint use agreements. In that proceeding, the Enforcement Bureau stated:

> In support of applying the Old Telecom Rate, Verizon cites the *Order*'s statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility. The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."[123]

Consistent with the Enforcement Bureau's statement in the *Verizon v. FPL Decision*, the Commission should again refuse to apply its 2011 regulatory changes to an agreement that predates the *2011 Pole Attachment Order* by several decades.[124]

2. AT&T Was Not and is Not in an Inferior Bargaining Position.

AT&T was not in an inferior bargaining position to FPL when it entered the 1975 JUA and it is not in one currently. The facts and economic principles applicable then and now show

[120] *2011 Pole Attachment Order*, ¶ 216.
[121] *Id.*, n.654 (emphasis added).
[122] *Id.*, n.647.
[123] *Verizon v. FPL Decision*, ¶ 23.
[124] In addition, the *2011 Pole Attachment Order* cannot and should not be applied retroactively to the 1975 JUA for the same reasons stated in Sections V.B., C, and D, *supra*.

that A&T is more than capable of protecting its own economic interests without the Commission's assistance.

Of the total 426,465 joint use poles owned by the parties at the inception of the 1975 JUA, Southern Bell owned 173,256, or 40.6%, and FPL owned 253,209, or 59.4%.[125] This is relevant because the Commission has looked to the pole ownership ratio between the ILEC and electric utility as a factor in determining whether the electric utility could or did exercise bargaining power.[126] In this case, however, AT&T's pole ownership ratio is not indicative of inferior bargaining power as either a matter of economic analysis or practical fact.

First, Mr. Zarakas explains in his analysis:

> [R]elying on the percentage of pole ownership as a primary indicator of bargaining power is misleading for the case at hand. Joint pole ownership involves mutual dependence on pole access, which differs significantly from the buyer / seller relationships underlying traditional market power analysis (i.e., where buyers of a service are also not sellers of the same service). FPL would be significantly harmed by foreclosure of access to the 40% of joint use network poles that were owned by AT&T in 1975 . . . . [And] [i]t would be irration for FPL to engage in a game of brinksmanship with AT&T, irrespective of any potential differences between FPL and AT&T in harm associated with loss of the joint use agreement.[127]

Mr. Zarakas further explains that this is consistent with the FCC's own analysis:

> The Commission itself has acknowledged that the percentage of pole ownership is not the sole indicator of bargaining power. In its 2011 Pole Attachment Order, the Commission explained that well established bargaining theories "predict that each party will consider its best alternative to a negotiated agreement when negotiating." Specifically, the Commission noted that, although pole ownership percentage may be an initial indicator of bargaining power, "less-costly alternatives for the incumbent LEC to pole deployment, or additional costs that the electric utility would need to consider under the best outside alternative, this would reduce the disparity in the relative bargaining power of the parties." In the absence of mandatory ILEC pole access, the least cost alternatives for AT&T and FPL would

[125] Kennedy Decl, ¶ 35.
[126] *Id.*, ¶ 8; *see Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power,* 32 FCC Rcd 3750, 3757 (2017), ¶ 13 ("*Verizon v. Dominion Decision*").
[127] Zarakas Dec., ¶ 25.

> be the avoided cost associated with building out an independent pole network – a very costly alternative.[128]

In other words, although AT&T claims that FPL was in a superior bargaining position because AT&T benefitted from access to FPL's essential facilities, the converse was also true. Two regulated natural monopolies that both benefitted from access to one another's facilities, and both would have had to incur great cost to build their own pole network, can hardly be said to have been in unequal bargaining positions.

Even looking solely to the parties' pole ownership ratio as of 1975, AT&T owned nearly 41% of the poles. This is a significantly greater percentage than the FCC has indicated would be a factor in concluding the ILEC lacked bargaining power.[129]

Perhaps the best evidence of equal bargaining power is that AT&T clearly and successfully negotiated the agreement it desired. The 1975 JUA succeeded a 1961 agreement between AT&T and FPL. The 1961 joint use agreement was effectively co-authored by three of AT&T's predecessors because it was based on a guiding document those predecessors prepared in cooperation with the Edison Electric Institute. The 1961 joint use agreement became the basis for the 1975 JUA. And after signing the 1975 JUA, AT&T proclaimed that FPL had accepted AT&T's proposed space allocation,[130] defined as the "objective percentage." The objective percentage also established the parties' goals for each one's respective pole ownership ratio.[131]

Indeed, a comparison of the history of the parties' agreements over time demonstrates that AT&T was not in an inferior bargaining position when it negotiated the 1975 JUA. The adjustment rate was amended from "the annual fixed charges on the average unit in plant cost of

[128] *Id.*, ¶¶ 26–27 (internal citation omitted).
[129] *See Verizon v. Dominion Decision*, ¶ 13; *see also 2011 Pole Attachment Order*, ¶ 199.
[130] Kennedy Dec., ¶¶ 32-33.
[131] Complaint, *Exhibit* 1, §§ 4.3, 10.9.

all of the poles of both companies" in the parties' previous agreements to "the average annual cost of joint use poles for the next preceding year as determined by the party having more than its objective percentage ownership of jointly used poles" and the apportionment of the adjustment rate for joint use was amended to 47.4% for the Telephone Company and 52.6% for the Power Company; however, the option allowing the company owning a minority of poles to purchase poles was removed.[132] At the time, AT&T proclaimed the following:

> *The principle of space usage recognition* ***has been accepted by FP&L****. The rental rate is based on percentage ownership reflecting space allocations of 47.4% for the Telephone Company and 52.6% for the Power Company, rather than the old reciprocal rate.* [emphasis added].[133]

AT&T continued:

> *Since it is expected that the annual adjustment rate will increase in subsequent years, all of the areas should continue efforts to reach our objective percentage of pole ownership as early as practicable. This would reduce the effect of the higher rental rate.*[134]

Thus, AT&T knew the impact of not investing in infrastructure in 1975, had the opportunity to normalize pole ownership since 1961, yet chose to allow FPL to make the investment in the pole infrastructure, knowing the consequences of higher rental rates.[135] This flies in the face of the assertions by AT&T's expert that the apportionment of the adjustment rate was forced upon AT&T by FPL, and, moreover, that the apportionment of the adjustment rate is somehow proof of unequal bargaining power between the parties.[136]

In sum, because AT&T co-authored and obtained the 1975 JUA as it wanted, with the space allocation it wanted, and because pole ownership ratios are not conclusive and in any event

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[132] *See* Kennedy Dec. ¶ 33.
[133] *See Exhibit* B to Kennedy Dec., Letter from AT&T's negotiating representative.
[134] *Id*.
[135] Zarakas Dec., ¶¶ 5, 19–21.
[136] *See Exhibit* D to the Complaint, Dippon Aff. ¶ 29.

AT&T owned 41% of the poles, the 1975 JUA was not the product of FPL's exertion of bargaining power over AT&T's allegedly inferior bargaining position at the time.

Turning to the parties' recent interactions regarding the 1975 JUA, AT&T's bargaining position, with respect to FPL, could not and cannot plausibly be characterized as "inferior." AT&T is the largest telecommunications provider in the world.[137] It is the ninth largest corporation in the United States by total revenue according to Forbes 500.[138] AT&T generated over $170 billion in revenue in 2018.[139] In 2018, AT&T's assets were valued at $531 billion and the company had approximately 273,210 employees.[140] Its stock is publicly traded on the New York Stock Exchange. It is disingenuous for AT&T to even suggest that it is in an inferior bargaining position to FPL. "Where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation," the Commission has held that "it generally is appropriate to defer to such negotiations."[141]

In addition, as Mr. Zarakas explained, AT&T's current ownership of 34% of the poles does not place it in an inferior bargaining position. "FPL would be significantly harmed by foreclosure of access to . . . the 34% of [joint use network poles] that are currently owned by AT&T. It would be irrational for FPL to engage in a game of brinksmanship with AT&T . . . ."[142]

Most significantly, the parties' recent conduct shows that there has been no exertion of bargaining power by FPL:

> There is no evidence that FPL has taken any proactive action to exploit its alleged increase in bargaining power. Specifically, it has not changed the terms or formulas

[137] AT&T, *https://en.wikipedia.org/wiki/AT%26T* (last visited Sept. 9, 2019).
[138] Forbes Fortune 500, https://fortune.com/fortune500/search/ (last visited Sept. 9, 2019).
[139] Q4 2018 AT&T Earnings Investor Briefing, https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/quarterly-earnings/2018/4q-2018/IB_4Q2018.pdf (January 30, 2019) (last visited Sept. 9, 2019).
[140] AT&T Inc. 2018 Quarterly Report (10-Q), *U.S. Securities and Exchange Commission*, https://www.sec.gov/Archives/edgar/data/732717/000119312518236782/d592180d10q.htm (August 2, 2018) (last visited Sept. 9, 2019).
[141] *2011 Pole Attachment Order*, ¶ 215.
[142] Zarakas Dec., ¶ 25.

> in the original joint use agreement in order to realize higher rates. As indicated earlier, payments from AT&T to FPL are due only when AT&T's percentage of pole ownership falls below the agreed upon objective percentage and, then, payment is only due for the "number of poles it is deficient from its objective percentage of ownership" multiplied by the adjustment rate, which is based on a formula which calculates the "average annual cost of joint use poles for the next preceding year," and where the annual cost is defined as the "average historic in-place cost of joint use poles … multiplied by an annual charge rate comprised of amortization factors, taxes and other elements of cost as determined in accordance with acceptable accounting practices." This formula, based on actual costs, has not changed since the Joint Use Agreement was signed in 1975.[143]

As for AT&T, it has not acted at all like a party subject to bargaining power.

> Telling evidence of the absence of bargaining power on the part of FPL can be found in the discussions and negotiations between FPL and AT&T themselves. AT&T and Dr. Dippon assert that AT&T was held hostage by FPL, with FPL refusing to consider alternatives to the rates set forth in the joint use agreement. However, as indicated above, FPL presents an entirely different account. FPL agrees with AT&T that it does not see a reason to change the joint use agreement, but also indicates that it has presented AT&T with alternative arrangements. Specifically, FPL indicates that, over the last five years, it has offered to purchase AT&T's poles and negotiate attachment rates and arrangements that would be comparable to what FPL provides to non-ILECs. However, FPL indicates that AT&T was largely unresponsive to its offer.[144]

There is only one reported pole attachment or joint use case that litigated, tried and decided the issue of whether an attacher such as AT&T is in an inferior bargaining position to an electric utility.[145] In the *Pacificorp* case, Comcast, the successor-in-interest to AT&T Corporation,

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[143] *Id.*, ¶ 22 (internal citations omitted).
[144] *Id.*, ¶ 23 (internal citations omitted).
[145] *Pacificorp v. Comcast,* Utah Public Service Commission, Docket No. 03-035-28, Report and Order (Issued December 21, 2004).The Market Disputes Resolution Division of the Enforcement Bureau found in an interim order that a two-to-one ratio of pole ownership between a utility and an incumbent LEC could serve as evidence of unequal bargaining power. *See In the Matter of Verizon Virginia, LLC & Verizon S., Inc., Complainants,* 32 F.C.C. Rcd. 3750, 3757 (2017). However, as much of the factual information that the Commission staff examined to make this determination is confidential, this decision is of little precedential value to the instant matter. Moreover, here, as detailed below, FPL can provide evidence that many of the provisions of which AT&T now complains were actually terms that AT&T apparently advocated for during the parties' negotiations. Finally, the contract at issue in the above *Verizon* case was entered after the *2011 Pole Attachment Order* at a time when the utility owned 65 percent of the poles and four years of intense negotiations had failed to provide the incumbent LEC any downward rate adjustment. *Id.*, ¶¶ 12–13.

claimed that it should be absolved of payment obligations under the parties' pole attachment agreement because it was unfairly forced upon Comcast. After hearing all of the evidence at trial, the Commission decided:

> **We decline, however, to view AT&T [through its cable affiliate] as a corporate David in a land of Goliaths.** Ms. Fitz Gerald testified [for Pacificorp] that she conducted negotiations over an extended period of time both in person and via email with at least two representatives of AT&T. Although these negotiations resulted in little if any change from the standard agreement put forward by PacifiCorp, they were negotiations nonetheless. Furthermore, they were negotiations **between two dominant and sophisticated corporations with access to teams of attorneys, as well as to this Commission. We therefore decline to view the product of such negotiation as a contract of adhesion.**[146]

Finally, AT&T is, and always has been, free to install its own poles as it enters new service areas. Florida law allows AT&T to do so. Public reports regarding AT&T's revenues and assets indicate that it certainly has the capital to do so and AT&T has never suggested it lacks the financial capacity to install its own poles. The 1975 JUA and the predecessor agreements gave AT&T the right to set as many new joint use poles as it wished. AT&T simply chose not to invest in its pole infrastructure of its own accord.[147]

3. AT&T Does not Lack the Ability to Terminate or Renegotiate the 1975 JUA.

AT&T has not—and cannot—demonstrate "that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[148] To the contrary, AT&T has never shown interest in renegotiating the JUA nor has it ever meaningfully attempted to renegotiate the rate formula contained in the JUA.[149] It had the ability to obtain a new agreement, if it had elected to

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[146] *Id.* at 35 (emphasis added). Notably, AT&T Corporation/Comcast owned no poles to use as bargaining leverage with Pacificorp and at the time was a far smaller corporate Goliath than it is now. Indeed, AT&T was never a corporate David, not even in 1975. At that time, AT&T's predecessor, Southern Bell Telephone and Telegraph Company, had the opportunity to approach the Florida Public Service Commission to complain about the actions of a sister public utility, if necessary, long before this Commission exercised jurisdiction over joint use.
[147] Kennedy Dec., ¶ 34; Zarakas Dec., ¶¶ 5, 19–21.
[148] *2011 Pole Attachment Order*, ¶ 216.
[149] Kennedy Dec., ¶¶ 33, 36.

negotiate on sensible commercial terms.[150] Indeed, FPL emphasized several times that it was willing to negotiate a new rate going forward. Instead, AT&T opted to simply stop paying any amount that it owed FPL for attachments that spanned a period of two years and then file a Complaint seeking to have the Commission mandate a new rate for the parties' 43 year old agreement both prospectively and retroactively.

Most tellingly, AT&T could have placed itself essentially in the position of a CLEC licensee but chose not to do so.

> For at least the last five years, FPL has sought several times to purchase AT&T's poles that FPL is attached to with no pre-set conditions on the negotiation. AT&T had the opportunity to off-load their poles and in return, have FPL negotiate with AT&T rates, terms and conditions as well as access, through contractual obligation, comparable to other telecom carriers. AT&T never made the effort to seek comparable treatment and at one point told FPL that they do not own many towers and thus have to lease such space. Therefore, they see great value in the vertical space currently occupied on their poles. They also stated they would be willing to consider the offer if it placed them on a level playing field with other telecom providers (for example lower attachment rates). FPL noted that all these things could be considered and addressed in a newly negotiated agreement. AT&T did not follow up on FPL's idea.[151]

AT&T's failure to follow up on FPL's proposals is compelling evidence that FPL has not exerted bargaining power over AT&T, as Mr. Zarakas explains:

> FPL's offer and AT&T's decision to not pursue it is informative on two counts. First, AT&T's preference reveals that it finds value in the arrangements for pole attachments provided under the joint use agreement over that afforded under lease arrangements. Second, FPL's behavior does not indicate that it was exerting bargaining power to force AT&T into continuing with the joint use agreement. Instead, any impasse in negotiation stems from AT&T's preference for retaining the joint use agreement pole attachment while also demanding that it pay the rate associated with a differently situated pole attachment arrangement (i.e., under the non-ILEC telecom rate).[152]

4. There is No Significant Disparity between the Per-Pole Rates Charged to Each Party under the 1975 JUA.

[150] *Id.*, ¶ 36.
[151] *Id.*
[152] Zarakas Dec., ¶ 24.

A final factor the FCC has considered in deciding whether to review the terms of a joint use agreement under the *2011 Pole Attachment Order* is whether there is a "significant disparity" between the per-pole rates charged to each party under the joint use agreement.[153] In *Verizon v. Dominion*, the Commission found a significant disparity between the parties' per-pole rates because Dominion was allocated significantly more space per pole than Verizon, yet paid a significantly lower total rate per pole than Verizon.[154] Such is not the case here.

For 2017 rent paid under the 1975 JUA, FPL paid AT&T [redacted] more for its attachments to AT&T's poles than AT&T paid FPL for attachments to FPL's poles. This is nothing like the "significant rate disparity" in the *Verizon v. Dominion* decision. And to the extent there is any small difference in the parties' respective per-pole rates, it is solely attributable to AT&T not investing in its pole infrastructure and its embedded costs are thus far lower than FPL's embedded costs.[155]

B. Even if the Commission Evaluates the 1975 JUA Rates, They are Just and Reasonable Because the 1975 JUA Provides Net Value to AT&T that far Exceeds AT&T's Net Payments under the Agreement.

Although FPL has demonstrated that the Commission should not disturb the 1975 JUA and engage in the exercise of evaluating whether its rates are just and reasonable, should the Commission choose to evaluate the 1975 JUA rates it must find them lawful. First, under the *2011 Pole Attachment Order*, the burden of proof to demonstrate that the rates are unjust and unreasonable is squarely on AT&T. AT&T did not and cannot meet its burden. Second, AT&T so greatly values its status and benefits as a joint user that it showed no interest in FPL's offers to buy its poles and essentially treat AT&T as a CLEC licensee. AT&T therefore admitted by its

[153] *See Verizon v. Dominion Decision*, at 3756–57.
[154] *Id.* at 3760.
[155] Kennedy Dec., ¶¶ 33–35; Zarakas Dec., ¶¶ 5, 18–21

conduct that it is not is not similarly situated to CLECs and receives valuable material advantages under the JUA as compared to CLECs. Third, an examination of AT&T's benefits under the JUA establishes that AT&T receives significant value from material advantages that CLECs do not receive. Fourth, the material benefits to AT&T are not outweighed by its obligations as a pole owner. Finally, the correct calculations show that application of the old telecom rate over the period in question would result in a net payment owed by AT&T that vastly exceeds the amount billed under the 1975 JUA rate. All of these facts establish that the 1975 JUA rate is just and reasonable.

1. The burden of proof is on AT&T under the *2011 Pole Attachment Order* Framework.

The presumption established by the *2018 Third Report and Order* does not apply to this matter, as established above, because the 1975 JUA is not a new or newly renewed agreement.[156] To the extent that the prior framework of the *2011 Pole Attachment Order* for evaluating ILEC joint use rate complaints applies to this matter, which FPL has shown it does not, that framework places the burden of proof squarely on the ILEC complainant, as it was in the *Verizon v. FPL Decision*.[157] There, the Commission dismissed Verizon's complaint, noting multiple times that the burden was on Verizon and Verizon had failed to carry its burden:

- "[W]e dismiss Verizon's complaint because Verizon has proven neither that the rates established by the governing agreement between Florida Power and Verizon's predecessor are unjust and unreasonable, nor that Verizon is similarly situated to competitive local exchange carriers."[158]
- "Specifically, we find that Verizon has not met its burden of proving that the attachment rates established in a 1975 Joint Use Agreement (Agreement), which governs the rates that Verizon must pay to Florida Power (Agreement Rates), are unjust and unreasonable . . . ."[159]

[156] *See* Section V.A, *supra*.
[157] *In the Matter of Verizon Fla. LLC, Complainant*, 30 F.C.C. Rcd. 1140 (2015).
[158] *Id.*, ¶ 1.
[159] *Id.*, ¶ 2.

- "Verizon has provided insufficient evidence: (a) to support a finding that the Agreement Rates are unreasonable, and (b) for the Commission to set a just and reasonable rate."[160]
- "We find that Verizon has failed to meet its burden of proof that the rate is unjust and unreasonable for three reasons."[161]
- "Because Verizon has failed to meet its burden of proof, we do not grant the Complaint."[162]

If the *2011 Pole Attachment Order* is applied to this matter, AT&T must carry its burden under the framework of that order, which did not establish any formula for rates to be paid by ILECs but instead provided that ILEC complaints would be resolved on a "case-by-case basis."[163] With regard to agreements where the Commission indicated it would evaluate rates, terms and conditions, the Commission stated that if an ILEC "demonstrates that it attaches on terms and conditions that leave it 'comparably situated' to competitive LECs or cable attachers, 'competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider' . . . ."[164] On the other hand, if the agreement "'includes provisions that materially advantage the incumbent LEC' vis-à-vis other attachers, it is reasonable to look to the Old Telecom Rate as 'a reference point' for determining an appropriate rate."[165] Finally, the Commission stated that its evaluation would include consideration of "the rates, terms and conditions the incumbent LEC offers the utility or other attachers for access to its poles."[166]

FPL established above that the 1975 JUA is an agreement that long predates the order, entered into by parties with relatively equal bargaining power and with no expectation that the 1975 JUA provisions would be subject to Commission review. However, even if the

[160] *Id.*, ¶ 3.
[161] *Id.*, ¶ 21, *citing Knology v. Ga. Power*, 18 FCC Rcd 24615, 24635 (2003) (complainant in a pole attachment proceeding bears the burden of proof).
[162] *Id.*, ¶ 25.
[163] *Id.*, ¶ 6, *citing 2011 Pole Attachment Order*, ¶ 214.
[164] *Id.*, ¶ 7, *citing 2011 Pole Attachment Order*, ¶ 217.
[165] *Id.*
[166] *Id.*

Commission chooses to evaluate the rates, terms and conditions of the 1975 JUA, AT&T cannot carry its burden of establishing that the 1975 JUA rates are unjust and unreasonable. Much as Verizon in the *Verizon v. FPL Decision*, AT&T offers merely a cursory review of benefits under the 1975 JUA and "has not produced any evidence showing that the monetary value of [its] advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time."[167]

2. The Commission should decline to disturb the 1975 JUA because AT&T rejected FPL's offer to effectively treat AT&T as a CLEC.

The *2011 Pole Attachment Order* also noted that even for existing agreements predating the order that the Commission would otherwise not disturb, the Commission might evaluate the justness and reasonableness of the agreement's rates, terms and conditions if the ILEC could "demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement . . . ."[168] There is no such issue here. First, the 1975 JUA and AT&T's rights under it are now terminated under Article XII of the Agreement due to AT&T's defaults. Second, AT&T has made clear that it did not seek to renegotiate the 1975 JUA or its rates.[169] Third, despite AT&T's positon, FPL was—and has always been—willing to negotiate new rates with AT&T on a going-forward basis. Finally, FPL several times specifically proposed a purchase of all of AT&T's poles.[170] This effectively would have allowed AT&T prospectively to negotiate with FPL with no pre-set conditions for rates, terms, conditions, and access similar to other telecom carriers. AT&T did not follow up on FPL's proposals.[171]

AT&T therefore cannot now plausibly claim that it lacks the ability to terminate the 1975 JUA and obtain a new arrangement. AT&T contends that it should be treated just like a CLEC,

[167] *Verizon v. FPL Decision*, ¶ 24.
[168] *Id.*, ¶ 9.
[169] *See* letter dated January 28, 2019, from Michael Jarro to AT&T, attached as *Exhibit* 18 to Complaint. (ATT00215–16).
[170] Kennedy Dec., ¶ 36.
[171] *Id.*

but when FPL repeatedly offered effectively to do exactly that, AT&T insisted it preferred to remain a joint user. AT&T's incongruous choice removes any doubt that it is not comparably situated to a CLEC. Even AT&T does not believe it is.

As Mr. Zarakas explains:

> [AT&T's Declarations of Ms. Miller, Mr. Peters, and Dr. Dippon] are contradicted by AT&T's own actions and revealed preference. A reasonable and very practical test of comparability is whether or not AT&T is willing to substitute its joint use agreement for an arrangement that is the same or comparable to that provided by FPL to non-ILECs. As indicated above, FPL has sought several times to purchase AT&T's poles and negotiate attachment arrangements and rates that would be comparable to the arrangements and rates that FPL provides to non-ILECs. Such a conversion would remove any doubt about whether or not ILEC and non-ILEC attachment arrangements are comparably situated.[172]

AT&T's failure to follow up on FPL's proposals is compelling evidence that even AT&T does not view itself as comparably situated to a CLEC. AT&T's reaction to FPL's proposal is telling; "strongly suggesting that AT&T does not consider that the two pole attachment arrangements – one under the Joint Use Agreement and the other under FPL's lease arrangements to non-LECs – are similarly situated"[173]

3. The benefits of the 1975 JUA provide AT&T significant material advantages over CATV and CLEC licensees.

AT&T's refusals to accept FPL's proposals to effectively treat it as a going-forward CLEC go beyond showing that AT&T knows it is not comparably situated to CLECs. AT&T's refusals show further that it receives substantial material advantages under the 1975 JUA terms and conditions as compared to standard CLEC attachment terms and conditions. Thus, even if the Commission evaluates the 1975 JUA rates, terms and conditions against CLEC rates, terms and conditions, the 1975 JUA is just and reasonable. This is why, as Mr. Zarakas notes, AT&T

[172] Zarakas Dec., ¶ 30.
[173] *Id.*

prefers to preserve the 1975 JUA.[174] "AT&T's revealed preference is also aligned with representations made by FPL concerning the benefits that AT&T receives under the joint use agreement compared to those received by non-ILECs under leasing arrangements."[175]

A careful examination of AT&T's material benefits under the 1975 JUA makes clear why AT&T chooses to maintain the 1975 JUA and its benefits. Thomas Kennedy, P.E., who has worked for FPL since 1985, explains each material advantage the 1975 JUA affords AT&T.[176] Mr. Kennedy's declaration provides both fact witness and expert testimony, based on his first-hand knowledge of the relevant matters at issue and upon his experience, skill, training and expertise from 34 years with FPL and 25 years working with pole attachment and joint use issues. Each material advantage the 1975 JUA provides AT&T is addressed in turn. In addition, Mr. Kennedy has provided a summary chart identifying and quantifying the material benefits AT&T receives.[177]

First, the 1975 JUA allows AT&T to avoid market rates for attachments. The 1975 JUA requires FPL both to build pole infrastructure with enough strength and capacity to accommodate AT&T's attachments and to allow AT&T access to FPL's pole infrastructure.[178] If not for the 1975 JUA, FPL would do neither and would be required to do neither. AT&T would then have had to choose among the options of building its own pole line, undergrounding its own facilities or establishing a wireless network on non-FPL facilities or paying FPL a market attachment rate.[179] If FPL allowed AT&T access at market rates, an appropriate measure of such rates

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[174] *Id.*
[175] *Id.*, ¶ 31.
[176] *See generally* Kennedy Dec.
[177] *Id.*, *Exhibit* J.
[178] *Id.*, ¶ 7.A.
[179] *Id.* In this scenario, AT&T would have to pay a market rate even if the FCC regulated access to and rates, terms and conditions for ILECs, because FPL's poles would have been at full capacity and AT&T would be a buyer "waiting in the wings." *See Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), 1370. Under the *Alabama Power Co.*, decision, FPL would then be entitled to charge AT&T a market rate.

would be the unregulated rate AT&T currently voluntarily pays for attachments to FPL's transmission poles, to which AT&T has no right or regulated access or rates.[180] AT&T paid FPL the following transmission attachment rates for 2014 to 2018:[181]

	2014	2015	2016	2017	2018
Transmission Rates	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

In addition, other attachers with no mandatory access pay FPL a negotiated pole rental rate shown in the first line of the chart below, which is generally less than the attachment rate AT&T pays FPL for attaching to the larger transmission structures. The per pole savings AT&T realized each of those years, or the difference between the annual joint use rate and unregulated attachment rate, is as follows:[182]

	2014	2015	2016	2017	2018
Market Rate 1'	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Joint Use Rate 4'	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Value to AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Using an average number of 418,558 AT&T attachments per year on FPL poles, the 1975 JUA provides a cumulative annual savings to AT&T for 2014 to 2018 is as follows:

	2014	2015	2016	2017	2018
Total Value to AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

In sum, the 1975 JUA allows AT&T to avoid paying arms' length attachment rates of [redacted] per year.

[180] Kennedy Dec., ¶ 7.B.
[181] *Id.*
[182] *Id.*

Second, the 1975 JUA affords AT&T the space allocation percentage it successfully negotiated.[183] AT&T in 1975 requested and received agreement from FPL to allocate 47.4% of the space on each joint use pole to AT&T and 52.6% to FPL. As Mr. Kennedy notes, AT&T is the only ILEC in a joint use relationship with FPL that was able to negotiate that "ratio of pole cost responsibility."[184] Compared to other joint users, the reduced cost ratio provides AT&T an annual savings benefit as follows:

	2014	2015	2016	2017	2018
AT&T attached to FPL Wood	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
FPL attached to AT&T Wood	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total AT&T savings	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

In sum, the percentage ownership AT&T successfully negotiated and never sought to change saves AT&T approximately [redacted] annually, for a total of [redacted] in savings from 2014–2018.[185]

Third, the 1975 JUA guarantees AT&T access rights to FPL's pole network, access rights which are voluntarily granted by FPL.[186] In short, Section 4.2 of the 1975 JUA requires FPL to, "at FPL's cost, . . . set joint use poles that are 10 feet taller than it needs to serve its electric customers (i.e., 4 feet for AT&T + 3'4" for communication space and additional 1 foot of pole burial space; but not required if FPL facilities are the only facilities on the pole). The 8'4" additional space translates to 10 feet as poles are procured in 5 foot increments."[187]

[183] *See* Section V.A.2, *supra*; Kennedy Dec. ¶¶ 8, 33, and *Exhibit* B.
[184] Kennedy Dec., ¶ 8.
[185] *Id.*
[186] *Id.*, ¶ 9.
[187] *Id.*

The additional cost of a pole necessary to accommodate AT&T is [redacted] per pole.[188] As the population of Florida is growing quickly and AT&T is installing approximately 3,000 new attachments per year, "FPL is spending more than [redacted] per year to accommodate AT&T and the communication worker safety space,"[189] which means that FPL has spent over [redacted] in today's dollars to build poles specifically tall and strong enough to suit AT&T's attachments.

There is no doubt that the communication workers safety space on FPL's joint use poles should be allocated to AT&T. These are FPL's poles, and but for the presence of AT&T, there would be no need for the 40" of communications worker safety space. Allocating that space to AT&T is consistent with the Commission's principles of "cost causation" and charging the party responsible for causing a cost with the amount of the cost it caused.[190]

Fourth, the 1975 JUA provides AT&T the benefits of avoiding make-ready and having FPL voluntarily expand capacity. Under the agreement, all FPL poles are built to suit joint use and provide 4 feet of guaranteed space to AT&T. Moreover, the 1975 JUA requires FPL in certain circumstances to expand capacity to accommodate AT&T.[191] AT&T therefore never has to address the issue of a pole that has reached capacity and cannot accommodate AT&T. Other telecom providers, however, do not have the same benefit. There are times when a pole is at capacity and FPL exercises its right not to expand capacity voluntarily.[192] In those instances,

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[188] "This excludes consideration of the cost of thousands of concrete poles FPL has set to accommodate AT&T and the communication space in order to meet the more stringent wind load requirements associated with FPL's FPSC-approved hardening construction standards." *Id.*

[189] *Id.* As Mr. Kennedy notes, the design and installation of FPL's poles to accommodate AT&T and others is beneficial to AT&T and the communications industry and it is critical that FPL be compensated for its voluntary design of such poles. "Without proper compensation, FPL will have to reevaluate the benefits of joint use agreements, and, in particular, whether it should continue to design and invest in a network of poles that are more expensive than it needs for its own purposes. Of course, if FPL were to install poles 10' shorter, it would not only impact AT&T but the entire communication/CATV industry, as well as broadband deployment, as communication space currently available on joint use poles would disappear." *Id.*

[190] *See 2011 Pole Attachment Order*, ¶ 143.

[191] Kennedy Dec., ¶ 21.

[192] *Id.*, ¶ 10.

AT&T's alleged competitors "are required to find an alternative, such as choosing a different pole line route requiring additional cable, equipment and more pole attachment fees or undergrounding their facilities."[193]

In addition, FPL builds joint use poles specifically to accommodate AT&T, thus AT&T avoids make-ready on any pole without any financial contribution to construction of that pole. "If FPL built a pole line for FPL's needs only, not only would it save FPL [redacted]/pole installed, but it would cost AT&T about [redacted]/pole to replace the existing wood pole with a wood pole that could accommodate communication space as well as a communication worker safety space." The replacement cost of [redacted] is for a wood pole; the cost would increase to [redacted] per pole for concrete poles.[194] As Mr. Kennedy notes: "With AT&T attaching to 3,000 new poles per year, that would be a major increase to its new construction expense and would place its time-to market in line with other telecom providers."[195]

Comparing AT&T to its alleged competitors, those other attachers, even with a communications space and communications workers safety space already on each FPL pole, have paid the following average make-ready costs to FPL for each pole over the last 5 years:

	2014	2015	2016	2017	2018
Make-Ready cost	[redacted]				
Poles	823	1826	705	705	1774
Cost per pole	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[193] *Id.*
[194] *Id.*
[195] *Id.*

Fifth, the 1975 JUA provides AT&T with guaranteed free make-ready.[196] Because the FCC does not allow FPL to prevent other attachers from using the space reserved for AT&T until AT&T needs it, if AT&T does need the space and it is occupied, the 1975 JUA will require FPL to expand capacity at no cost to AT&T.[197] If, for example, AT&T chooses to reclaim its allocated 4 feet of space in order to lease the space to its wireless affiliate in building out its wireless network, FPL customers could be required to pay for the cost of expanding capacity on up to 7,000 to 10,000 poles to accommodate node locations.[198] Other telecom attachers would not be guaranteed that FPL would expand capacity and, if FPL chose to expand capacity, would have to pay for it.

The possibility of AT&T building out FPL poles to accommodate wireless attachments brings up an additional, related benefit to AT&T. AT&T is guaranteed access to 4 feet of space on FPL's poles without having to pay for capacity expansion and for any purpose it requires. AT&T could use the space FPL provides to lease 5G wireless nodes to its affiliates or other telecom providers at market rates, while paying FPL the joint use rate.[199]

The value of guaranteed access for AT&T to potential node locations is approximately [redacted], for a buildout of 7,000 to 10,000 nodes.[200] The value of free make-ready to AT&T, as compared to what other carriers would have to pay should they be granted capacity expansion, is approximately [redacted] for a buildout of 7,000 to 10,000 nodes.[201]

[196] *Id.*, ¶ 11.
[197] *Id.*; 1975 JUA, Section 14.5.
[198] Kennedy Dec., ¶ 11.
[199] *Id.*
[200] *Id.*
[201] *Id.*

Sixth, the 1975 JUA provides AT&T the savings of the time value of money.[202] While AT&T pays its joint use fees in arrears annually (*e.g.,* in March of 2018 for the year 2017), other telecom providers pay pole attachment fees in advance semiannually (in June and December of the billing year). AT&T therefore has use of its money for many months after other telecom providers pay their attachment fees in advance. The annual cumulative and per pole advantage to AT&T for the past five years from this benefit is as follows:[203]

	2014	2015	2016	2017	2018
Savings	[redacted]	[redacted]	[redacted]	[redacted]	
Poles	397,221	401,099	412,357	418,558	425,704
Advantage per pole	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

In sum, this advantage benefits AT&T by nearly [redacted].

Seventh, the 1975 JUA provides AT&T the unfettered priority space on each FPL joint use pole.[204] "Standard practice and code compliance also provides AT&T the right to the preferred spot on the pole—the lowest position—which ensures easy access and quick construction methods."[205] "Also, AT&T is almost always the first to attach to a new joint use pole."[206] The flexibility of this preferred space allows AT&T easy and unencumbered access to the pole, quick construction methods and elimination of any need to wait for any other attacher to do make-ready.[207] In contrast, because AT&T typically does not attach at the lowest possible point on the pole, other attachers often have to ask for permission to attach below AT&T or pay AT&T to move and wait for it to do so. This causes cost and delay to other telecom providers

[202] *Id.*, ¶ 12.
[203] *Id.*
[204] *Id.*, ¶ 13.
[205] *Id.*, ¶ 20.
[206] *Id.*, ¶ 13.
[207] *Id.*, ¶ 20.

which AT&T does not experience.[208] Finally, despite AT&T's claims that attaching at the lowest space on the pole is actually not preferred, they have never asked FPL to attach anywhere else on the pole.[209] Indeed, the FCC's recent one-touch make ready rules and accelerated access timelines make clear that the FCC itself believes there is great value in avoiding make-ready delays and facilitating the rapid deployment of communications facilities in the public interest.[210] Moreover, FPL is unaware of any accidents necessitating AT&T's replacement of a joint use pole cause by AT&T's attachment position on the pole.[211]

Eighth, the 1975 JUA provides AT&T free make-ready for the life of the joint use attachment.[212] The terms of the 1975 JUA obligate the pole owner to operate and maintain the joint use pole so long as there is a joint use attachment. "That means when the FPL pole reaches end of life or when FPL is forced to relocate a joint use pole (e.g., the Department of Transportation forces relocation of the pole for roadwork), FPL is responsible for replacing/relocating the pole without contribution from AT&T. In accordance with the JUA, the new replacement FPL pole must be built to accommodate AT&T's joint use attachments."[213] Unless other telecom attachers are able to free ride on this arrangement because they are attached to a joint use pole, they must pay FPL for the additional cost they cause in connection with a pole replacement not cause by a third party (*e.g.,* when the pole reaches the end of its useful life). That amounts to AT&T saving [redacted] per pole for replacement of joint use poles that reach the end of their life. Other attachers on just under 400,000 non-joint use-poles must pay such costs.

[208] *Id.*, ¶ 13. While the FCC's one-touch make-ready process may ameliorate this issue somewhat, it remains to be seen to what degree it will do so, and any suggestion by AT&T as to the future effect of one-touch make-ready is pure conjecture. Subsequent attachers are still going to have to pay make-ready fees to have AT&T move. *Id.*
[209] *Id.*, ¶ 20.
[210] *See 2018 Third Report and Order*, ¶¶ 14–114.
[211] Kennedy Dec., ¶ 20.
[212] *Id.*, ¶ 14.
[213] *Id.*

"FPL must replace about 3,000 poles each year because they have reached the end of their useful life. AT&T is on about 1,000 of those poles receiving free make-ready. This saves AT&T about [redacted] each year in avoided make-ready."[214]

Ninth, the 1975 JUA provides that AT&T need not follow a permit process to obtain approval in advance of attaching.[215] Other telecom providers must do so. This means that other telecom providers must incur the time and cost to obtain a permit, both of which AT&T avoids. A typical permit costs [redacted].[216] In addition, the other telecom providers must perform and complete numerous tasks to finalize a permit application, including reviewing FPL's permit manual, collecting maps and data, performing engineering calculations coordinating with other attachers and assembling and completing various documentation for the permit package and post-attachment review. Mr. Kennedy enumerates the numerous tasks another telecom provider must complete and estimates, based on his experience, that the time to obtain a permit for each pole requires "several hours of preparation time per pole, field work (including travel), office design work, and permit preparation work" at a cost of approximately [redacted] per newly-installed pole.[217] "Given that AT&T makes approximately 3,000 new attachments annually, under the JUA, AT&T saves [redacted] in annual permit preparation costs."[218]

Mr. Kennedy further estimates that it could also take the attacher one or two months to get the application package to FPL's vendor, 45 days to get a response on the permit and, if make-ready is required, another 90 days to complete the attachment process.[219] AT&T is spared

[214] *Id.*
[215] *Id.*, ¶ 15.
[216] *Id.*
[217] *Id.*, ¶¶ 16, 17.
[218] *Id.*, ¶ 16.
[219] *Id.*

this wait time because it is not required to go through a permit and make-ready process. As Mr. Kennedy puts it: "While it is difficult to quantify this advantage, clearly, for AT&T it would include additional customers and increased revenues/income."[220]

Tenth, the 1975 JUA does not require that AT&T undergo the same post-inspection process to which other telecom providers are subject.[221] In addition, AT&T is not required to do its own post-attachment inspection,[222] nor is there any evidence that AT&T itself actually does any post-attachment inspections.[223] This means that AT&T saves not only the time required for such inspections, but also the per pole cost for them which is [redacted] per pole with no make ready and [redacted] per pole with make-ready. Given that AT&T makes approximately 3,000 new attachments annually, under the JUA it saves [redacted] in annual permitting and post-attachment inspection costs.[224]

Eleventh, the 1975 JUA "provides AT&T with unfettered access to FPL's poles, thereby essentially eliminating the potential for an unauthorized attachment."[225] There is no record of AT&T having been charged an unauthorized attachment fee, but other attachers are subject to an unauthorized attachment fee of [redacted].[226]

Twelfth, the 1975 JUA provides that AT&T does not have to pay any indirect overhead costs. "Where the JUA provides for the exchange of payment for make-ready . . ., AT&T is only charged direct construction costs plus overheads that are required for the work. Other attachers pay an allocation of all applicable overheads for make-ready work, including, for example,

[220] *Id.*
[221] *Id.*, ¶ 15.
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*, ¶ 18.
[226] *Id.*

administrative and general expenses."[227] This saves AT&T approximately 20% of the cost that other telecom attachers must pay.[228]

[redacted]

Fourteenth, the 1975 JUA provides AT&T the right to take ownership of a joint use pole when FPL abandons it. In contrast, other telecom providers are required to pay for the removal and/or relocation of their facilities when FPL abandons a pole.[235]

[227] *Id.*, ¶ 19.
[228] *Id.*, *Exhibit* J at 2.
[229] *Id.*, ¶ 17.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] [redacted]
[235] *Id.*, ¶ 22.

Fifteenth, the 1975 JUA provides AT&T the benefit of FPL sharing its common grounding pole bond with AT&T. While other attachers may benefit from this common bond, if additional bonding is required they must pay FPL for the work.[236]

Sixteenth, the 1975 JUA eliminates any need for AT&T to pay insurance and bond fees to protect FPL. Unlike other telecom attachers, AT&T is not required to carry insurance to indemnify FPL and name it as an additional insured.[237] Also, AT&T is not required, as are other telecom attachers, to purchase a bond annually to protect FPL against the cost of having to remove attachments. Such bonds are based on the number of attachers and typically require coverage of [redacted] per attachment.[238]

Seventeenth, the 1975 JUA provides AT&T the benefit of stronger concrete poles set by FPL at FPL's expense.[239] It is often the case that AT&T's attachments to FPL's pole add "significant load on the pole . . . primarily driven by the increase in pole height and the girth of the AT&T cable."[240] Under FPL's pole construction standards as approved by the Florida Public Service Commission, the additional load caused by AT&T requires FPL to set concrete poles. The 1975 JUA requires FPL to accommodate an increase in capacity without a contribution in aid of construction, so the stronger concrete poles are set at FPL's expense.[241] While AT&T pays a higher attachment rate for concrete poles, that rate pales in comparison to the [redacted] cost of installing such poles.[242]

Eighteenth, the 1975 JUA provides AT&T contribution from FPL to build a new relocated pole line. As Mr. Kennedy explains:

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[236] *Id.*, ¶ 23.
[237] *Id.*, ¶ 24.
[238] *Id.*, ¶ 26.
[239] *Id.*, ¶ 25.
[240] *Id.*
[241] *Id.*
[242] *Id.*

> When FPL builds a new transmission structure line over an existing distribution pole line owned by either company, AT&T, at its own option, may relocate to a new pole line and require FPL to pay for one half the construction of an equivalent pole line to accommodate AT&T's facilities. AT&T's alleged competitors have no such option. They may either stay on the new transmission structure line and transfer their facilities to the new transmission poles or they can relocate their facilities at their own costs.[243]

AT&T has completely failed to address, much less attempted to quantify, the great value of all of the above benefits. In that way, this case is similar to the *Verizon v. FPL Decision*, in which the Commission stated that Verizon:

> has not produced any evidence showing that the monetary value of [its] advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time. Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement.[244]

4. FPL's provision of voluntary access to AT&T provides extraordinary benefit.

FPL provides AT&T access to its pole network voluntarily. Unlike with CLECs and CATV providers, FPL is under no legal obligation to provide mandatory access to AT&T.[245] The voluntary access FPL provides AT&T, which can also be seen as FPL's waiver of its right to exclude AT&T from FPL's pole infrastructure, provides extraordinary value to AT&T, both historically and on an annual basis. As noted above, the Commission itself recognized in the *Verizon v. FPL Decision* that such a grant of access provides value, stating that "Verizon

[243] *Id.*, ¶ 27, *citing* Joint Use Agreement, § 3.5
[244] *Verizon v. FPL Decision*, ¶ 24.
[245] *See 2011 Pole Attachment Order*, ¶ 202.

provides no evidence regarding the value of access to Florida Power's poles . . . ."[246] Neither does AT&T. FPL, however, has done so.

AT&T found an infrastructure partner in FPL which allowed AT&T to avoid the cost of building an entire network on its own. In fact, AT&T "realized considerable benefits over time in terms of cost and deployment efficiencies associated with its joint pole use arrangement with FPL."[247] The 1975 JUA "formed a sharing arrangement through which each party was able to reduce its costs of service without compromising quality. This gave AT&T ready and unfettered access to the joint pole network as if it were its own."[248] Absent mandatory access – which it does not have – and the 1975 JUA, the least cost alternative for AT&T "would be the avoided cost associated with building out an independent pole network – a very costly alternative."[249]

The value of this access to network deployment over time can be quantified as some of the costs Mr. Kennedy has demonstrated AT&T avoids. The 1975 JUA allows AT&T to avoid annual network deployment costs because FPL set both wood and concrete poles for AT&T. AT&T's avoided cost for pole setting has been significant. As AT&T makes approximately 3,000 new attachments per year, FPL sets the poles for those attachments. AT&T is therefore avoiding the costs of replacing an FPL wood pole with another FPL wood pole taller and stronger through make-ready process, which would cost AT&T about [redacted].[250] The 1975 JUA therefore allows AT&T to avoid pole setting costs of approximately [redacted] annually. Even if one views the avoided costs to AT&T conservatively, as the incremental cost to FPL to

[246] *Verizon v. FPL Decision*, ¶ 24.
[247] Zarakas Dec., ¶ 32.
[248] *Id.*
[249] *Id.*, ¶ 27.
[250] Kennedy Dec., ¶ 10.

build each pole tall and strong enough to support AT&T's attachments, AT&T avoids a cost of [redacted] per pole. Annually, that is an avoided costs of almost [redacted] per year. Cumulatively, for the 420,914 poles FPL has provided Verizon over the lifetime of the 1975 JUA, that is an avoided cost of [redacted].[251]

FPL's voluntary grant of access to AT&T can also be seen to provide AT&T avoided costs in terms of avoided annual market rental rates. AT&T pays a mutually agreed upon rate based on the ownership share allocation it negotiated with an infrastructure partner in the 1975 JUA. In contrast, if AT&T were not party to the 1975 JUA, it would pay FPL a market rate to attach to FPL's pole infrastructure. The best indicators of this rate are the rates that AT&T pays FPL for access to FPL's transmission facilities, to which AT&T is entitled to neither mandatory access nor regulated rates and the rates other unregulated entities pay FPL for pole attachments, and the rates unregulated entities pay for attachments to FPL's poles.[252] When compared to those rates, the JUA rate saved AT&T the following amount per pole for 2014 to 2018:[253]

	2014	2015	2016	2017	2018
Value to AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Using an average number of 418,558 AT&T attachments per year on FPL poles, the cumulative annual savings to AT&T for 2014 to 2018 is as follows:

	2014	2015	2016	2017	2018
Total Value to AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[251] *Id.*, ¶¶ 9, 33.
[252] Kennedy Dec., ¶ 7.B.
[253] *Id.*

In short, the 1975 JUA allows AT&T to avoid paying total market rates of [redacted]. Any way one looks at the avoided cost to AT&T provided by the value of FPL's grant of voluntary access, that value is critical to this proceeding. As Mr. Zarakas explains: "The Commission also recognized that ILECs receive value from access (to utility poles) itself which would likely be significant in monetary terms."[254]

Finally, the 1975 JUA also provided AT&T value in terms of obtaining and serving customers and building goodwill. "Seamless access to a pole network in the era before implementation of the Telecommunications Act of 1996 also allowed AT&T to establish itself as a reliable service provider in the eyes of its customers, which was a key factor in enabling the company to maintain a strong market share in the evolving market."[255]

5. AT&T's net benefits are not outweighed by its obligations as a pole owner.

AT&T claims that any benefits it receives under the 1975 JUA are offset by its obligations as a pole owner.[256] Several telling facts put the lie to AT&T's specious position.

First, AT&T has had several opportunities to get out of the pole owning business. FPL has proposed a purchase of all of AT&T's poles multiple times. AT&T has failed to follow up each time.[257] This is an admission that AT&T prefers to seek the best of both worlds, owning some poles but not so many as to incur the costs FPL does as a pole owner, while maintaining joint use terms and conditions but demanding CLEC rates.

Second, AT&T's alleged burdens as a pole owner are minimized by the reality that AT&T does not actually invest in its pole network. Indeed, AT&T has chosen deliberately over

[254] Zarakas Dec., ¶ 32.
[255] *Id.*
[256] Complaint, ¶ 30.
[257] Kennedy Dec., ¶ 36; Zarakas Dec., ¶¶ 27, 30, 34.

time not to invest in its own pole infrastructure. As Mr. Kennedy explains, the 1975 Letter and ensuing letters establish that AT&T knew it needed to reach intended pole ownership benchmarks.[258] It simply failed to do so. In fact, AT&T chose not to invest in its pole plant base. As Mr. Zarakas explains:

> Both FPL and AT&T added poles on an annual basis through roughly 1998, when each company's pole count increased by more than 30,000 poles. After that time, AT&T engaged in little pole construction. The change in the percentage of AT&T's pole ownership was thus due to AT&T's own initiatives; it could have maintained a pole ownership ratio that was at or near that in place in 1975 by building out more poles.[259]

Moreover, the "reduction in AT&T's percentage of pole ownership is due to AT&T not engaging in new pole construction. Furthermore, AT&T has not sought to purchase any joint use poles from FPL as a means of attaining the objective percentage of pole ownership. Thus, any reduction in the percentages of pole ownership largely reflects AT&T's own preferences. Going forward, AT&T can increase its percentage of pole ownership if it is willing to construct new poles. It can also request transfers of pole ownership from FPL."[260]

The day-to-day operational facts bear out AT&T's intentional decision not to invest in pole infrastructure. FPL sets new joint use poles, not AT&T.[261] When poles fail, AT&T does not replace them.[262] There is no mystery as to why AT&T is not interested in owning more poles: "The decline in AT&T's pole ownership percentage also coincides with the change in regulation away from a rate of return framework in which earnings are based on a rate base. The

[258] Kennedy Dec., ¶ 33.
[259] Zarakas Dec., ¶ 5.
[260] *Id.*, ¶ 20.
[261] Kennedy Dec., ¶ 34.
[262] *Id.*

shift away from rate-of-return regulation for ILECs has reduced their incentives to invest in assets."[263]

Third, it is not appropriate to treat the obligations AT&T has as a pole owner as an offset to what FPL should be paid. Rather, those obligations are reflected in the amount AT&T charges its attachers for the use of AT&T's poles. AT&T's rates to attachers capture investment, operations, overhead and maintenance expenses similarly to how those expenses are captured for FPL through its FERC accounts. AT&T is therefore reimbursed for its pole ownership costs through the rates it charges attachers. In sum, AT&T's pole ownership obligations impact ATT's pole attachment *revenues* from attachers, not ATT's *expenses* to FPL.

Finally, there is a simple mathematical reason why AT&T's obligations as a pole owner *vis a vis* AT&T do not outweigh its benefits. AT&T now owns roughly 34% of the parties' joint use poles and FPL owns roughly 66%. AT&T would have the Commission believe any benefits it receives net out due to any costs or obligations it occurs. AT&T, however, simply ignores the 22% of the poles it does not own and as to which it suffers no costs or disadvantages as a "pole owner."

6. The 1975 JUA rate is the appropriate and lawful rate.

Under the framework of the *2011 Pole Attachment Order*, which FPL has shown does not apply to this matter, the value of the material benefits to AT&T under the 1975 JUA, the extraordinary value of FPL's grant of voluntary access to its poles and the lack of any real ownership burdens on AT&T combine to establish that the 1975 JUA rate is just and reasonable.

[263] Zarakas Dec., ¶ 21.

The Commission here must look to the "totality of [the] agreement[]" and determine whether there must be "similar treatment of similarly situated providers."[264]

AT&T has failed to carry its burden of showing that it is similarly situated to its alleged competitors and that the 1975 JUA rates are unjust and unreasonable. AT&T does not even attempt to account for the numerous advantages it is afforded under the 1975 JUA or the value of those advantages.

FPL, in contrast, has provided "sufficient justification" for the 1975 JUA rates showing that AT&T "has been advantaged relative to a typical competitor . . . ."[265] FPL has established eighteen material advantages to AT&T under the 1975 JUA, many of which provide significant monetary value to AT&T, that other telecom providers do not receive, ranging from the great financial benefit of avoided rates, avoided make ready and avoided pole setting to the ease and convenience of a lack of permitting and post-attachment inspections, preferred pole space access and common bonding.[266] In addition, FPL has put forth quantifications of the exceptional value of the grant of voluntary access both historically and on annual basis in terms of avoided rates and deployment costs. Finally, FPL has put the lie to AT&T's claim that it would rather not be subject to the alleged burdens of pole ownership. The 1975 JUA rates are just and reasonable because AT&T receives significant net material advantages as compared to other telecom providers and is not similarly situated to such providers.

This proceeding thus stands in contrast to the only proceeding where the Commission has evaluated whether the rates under a joint use agreement are justified— the *Verizon v. Dominion Decision*. There, the Commission found that the electric utility had "overstated" the value of a

[264] *In the Matter of Verizon Virginia, LLC & Verizon S., Inc., Complainants*, 32 F.C.C. Rcd. 3750, ¶ 10, *citing 2011 Pole Attachment Order*, ¶ 216.
[265] *Id.*, ¶¶ 20-22 (internal citations omitted).
[266] *See* Section V.B.3, *supra*.

number of benefits under the joint use agreement and also failed to "quantify the purported material advantages" to the ILEC.[267] Here, however, FPL has enumerated numerous material advantages to AT&T, provided fact-based values for those advantages wherever possible and offered a valuation of FPL's grant of voluntary access to AT&T. Finally, to remove any doubt as to the value of the benefits under the 1975 JUA, FPL has established that AT&T has chosen to preserve its benefits, rights and obligations as a joint use owner by rejecting several proposals from FPL to buy all of AT&T's poles. As Mr. Zarakas explains this decision:

> [AT&T's Declarations of Ms. Miller, Mr. Peters, and Dr. Dippon] are contradicted by AT&T's own actions and revealed preference. A reasonable and very practical test of comparability is whether or not AT&T is willing to substitute its joint use agreement for an arrangement that is the same or comparable to that provided by FPL to non-ILECs. As indicated above, FPL has sought several times to purchase AT&T's poles and negotiate attachment arrangements and rates that would be comparable to the arrangements and rates that FPL provides to non-ILECs. Such a conversion would remove any doubt about whether or not ILEC and non-ILEC attachment arrangements are comparably situated. However, FPL indicates that AT&T did not respond to its offers, strongly suggesting that AT&T does not consider that the two pole attachment arrangements – one under the Joint Use Agreement and the other under FPL's lease arrangements to non-LECs – are similarly situated.[268]

In sum, a "foundational element[] underlying AT&T's assertion that the pole attachment rates charged by FPL are unjust and unreasonable [is] without basis and contradicted by the available evidence. Specifically: . . . AT&T's revealed preference (in opting to not accept FPL's offer to buy AT&T's poles and negotiate a pole attachment arrangement that would be comparable to that provided to non-ILECs) indicates that AT&T receives positive net benefits under the joint use agreement."[269]

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[267] *In the Matter of Verizon Virginia, LLC & Verizon S., Inc., Complainants*, 32 F.C.C. Rcd. 3750, ¶¶ 18, 20.
[268] Zarakas Dec., ¶ 30; *see id.* ¶¶ 17, 29–33.
[269] *Id.*, ¶ 34.

7. AT&T is not entitled to the old telecom rate, but even if it were, the old telecom rate over time would be in excess of the current JUA rate.

The *2011 Pole Attachment Order* provides that in ILEC complaint proceedings where the Commission finds it appropriate to evaluate the justness and reasonableness of rates due to the newness of the agreement and/or the exertion of bargaining power by the electric utility, the old telecom rate will serve as a "reference point."[270] FPL has shown above that the Commission should not engage in an analysis of the 1975 JUA rates or look to the old telecom rate as a reference point. First, the 1975 JUA is a longstanding agreement that predates the *2011 Pole Attachment Order* by 36 years and FPL did not exert any bargaining power over AT&T, thus the Commission should not evaluate the justness and reasonableness of the 1975 JUA rates. Second, even if the Commission did evaluate the justness and reasonableness of the 1975 JUA rates, FPL has enumerated and quantified net material advantages that fully justify the 1975 JUA rates.

Assuming *arguendo*, however, that despite the foregoing the Commission finds it necessary to look to the old telecom rate as a reference point, that reference point simply provides further evidence that the 1975 JUA rates are just and reasonable. In fact, over the course of 2014 to 2018, the average of the correctly calculated old telecom rate is *higher* than the 1975 JUA rates.

Ms. Deaton provides the calculation of the old telecom rates for AT&T's attachments to FPL's poles for 2014–18 as shown below and reflect that they are in fact higher in every year than the rates charged AT&T under the 1975 JUA:[271]

[270] *In the Matter of Verizon Virginia, LLC & Verizon S., Inc., Complainants*, 32 F.C.C. Rcd. 3750, ¶ 4, *citing 2011 Pole Attachment Order*, ¶ 218.
[271] Deaton Dec., ¶ 9.

Rate	2014	2015	2016	2017	2018
Old Telecom Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
1975 JUA Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

In fact, "[i]f AT&T and FPL each paid one another an attachment rate at the properly calculated pre-existing telecom rate for the years 2014-18, AT&T would owe FPL an additional [redacted]."[272]

As explained in Section II.B., *supra*, Ms. Deaton calculated the old telecom rates using input data for the FCC's formulas provided by joint use audits and a statistically reliable joint use survey.[273] Alpine Communication Corp. performed the audit in the ordinary course of business and performed the survey at FPL's request and direction.[274] Mr. Davis, FPL's statistical expert, ensured the statistical reliability of the survey.[275] FPL's joint use expert, Mr. Kennedy, synthesized the audit and survey data and provided the FCC formula inputs for Ms. Deaton to perform the rate calculations.[276] AT&T did no such data gathering or analysis and simply used the FCC's presumptive formula inputs. FPL's formula inputs, however, based on actual data, were as follows:[277]

[272] Kennedy Dec., ¶ 38. This figure assumes that AT&T's argument regarding the applicable statute of limitations at five years is valid, a position with which FPL disagrees.
[273] Deaton Dec., ¶¶ 8-9.
[274] Murphy, Dec., ¶¶ 4-23. .
[275] Davis Dec., ¶¶ 1-8. .
[276] Kennedy Dec., ¶¶ 30-31.
[277] *Id.*, ¶ 30.

FCC Variables	FPL Distribution Poles with AT&T Attached
AT&T Total Space Used	4.5’
Total Number of Attaching Entities	2.99
Average Pole Height	40.4’
Usable Space	15.9’
Unusable Space *	24.5’

* 40’ wood poles require 6.5’ of burial depth.

In addition, FPL used the same rate of return in its calculations as did AT&T.[278]

The comparison of the old telecom rate to the 1975 JUA rates is further compelling evidence that the 1975 JUA rates are just and reasonable. First, the general equivalence of the two rates directly undercuts the position of AT&T’s witness, Dr. Dippon, that the 1975 JUA rates exceed the old telecom rate.[279] Second, the general equivalence of the two rates shows that the 1975 JUA rates comport with the Commission’s reference point pursuant to the *2011 Pole Attachment Order*.

[278] Two points bear mention here. First, FPL has no authorized rate of return approved by a Florida Public Service Commission order, so it is entitled to use the Commission’s default rate of 11.25%. In the interests of fairness, however, FPL used the same rate of return, decreasing annually starting in 2016, that AT&T was required to use by the Commission’s orders applicable to ILECs. Deaton Dec., ¶ 8; Kennedy Dec., ¶ 31. Second, the “Communications Workers Safety Space” must be included in the total space allocated to AT&T because AT&T is the cost-causer for that space; but for FPL specifically building its own electric distribution poles tall enough to accommodate AT&T specifically, the 40” of safety space would not exist. Kennedy Dec., ¶ 30 n.26. The Commission’s prior order regarding safety space being allocated to the electric utility applied only to CLECs and CATV companies, which had mandatory access rights to poles that had already been built such that they were neither the cost-causer nor the party that directly contracted for the safety space.

[279] Dippon Dec., ¶¶ 23-25.

VI. Even if the *2018 Third Report and Order* Presumption Applies, the 1975 JUA Rates are Just and Reasonable.

A. The 1975 JUA Rates Are Just and Reasonable

FPL has shown in Section IV that the *2018 Third Report and Order* presumption regarding the new telecom rate does not apply in this case and in Section v. that under the framework of the *2011 Pole Attachment Order* the 1975 JUA rates are lawful. Even assuming, however, for the sake of argument that one were to analyze the 1975 JUA rates under the *2018 Third Report and Order* rubric, the rates remain just and reasonable.

The *2018 Third Report and Order* established a rebuttable presumption for "new and newly-renewed" joint use agreements – which the 1975 JUA is not – "that the incumbent LEC should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with section 1.1406(e)(2) of the Commission's rules."[280] The Commission also noted in the *2018 Third Report and Order* that "there may be some cases in which incumbent LECs may continue to possess greater bargaining power than other attachers, for example in geographic areas where the incumbent LEC continues to own a large number of poles."[281]

The rate presumption is rebuttable: "The utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers."[282] The Commission went on to explicate some of the evidence which could rebut the presumption:

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[280] *2018 Third Report and Order*, ¶ 126 (citations omitted).
[281] *Id.*
[282] *Id.*, ¶ 23. The Supreme Court has defined the "clear and convincing" standard as demonstrating evidence that is "highly probable," or that is substantially more likely to be true than untrue. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *see also Black's Law Dictionary* (11th ed. 2019). The clear and convincing standard is considered

> Such material benefits may include [p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed. If the utility can demonstrate that the incumbent LEC receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.[283]

Finally, the Commission held that if the electric utility successfully rebutted the presumption, the maximum rate that could apply would be the old telecom rate.[284]

FPL has met every condition to rebut the *2018 Third Report and Order*'s presumption and establish that the 1975 JUA rates are just and reasonable. First, this is certainly a case in which AT&T "continue[s] to possess greater bargaining power than other attachers [and] . . . continues to own a large number of poles."[285] As of 2017, AT&T owned 216,850 joint use poles, or 34% of the total owned between the parties.[286] Not only is that a "large number of poles" which are critical for FPL to access, but that number is greater than the "25 to 30%" ILEC ownership ratio that caused the Commission concern that electric utilities could exercise bargaining power.[287] Indeed, as Mr. Zarakas explains, FPL has not exercised any bargaining power over AT&T.[288] Nor could FPL do so simply because AT&T owns 34% of the poles.[289]

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more rigorous than the "preponderance of the evidence" standard, which is met when a party convinces a fact finder that the claim is more likely true than untrue, or that there is a greater than 50% chance that the claim is true. *See Black's Law Dictionary* (11th ed. 2019). Meanwhile, the clear and convincing standard is considered less rigorous than the "beyond a reasonable doubt" standard, which means the evidence must produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. See *id.*

[283] *2018 Third Report and Order* , ¶ 128 (internal quotations and citations omitted).
[284] *Id.*, ¶ 129.
[285] *2018 Third Report and Order*, ¶ 126
[286] Zarakas Dec., ¶ 4.
[287] *Verizon v. FPL Decision*, ¶ 5(*citing 2011 Pole Attachment Order*, ¶ 206).
[288] Zarakas Dec., Section III.
[289] *Id.*, ¶ 20.

Second, FPL has provided clear and convincing evidence that AT&T receives "net benefits under [the 1975 JUA with FPL] that materially advantage [AT&T] over other telecommunications attachers." Indeed, FPL has provided evidence of eighteen net benefits that CLECs do not receive, including benefits identical to those explicated in the *2018 Third Report and Order*:

- paying significantly lower make-ready costs;
- no advance approval to make attachments;
- no post-attachment inspection costs;
- rights-of-way often obtained by electric company;
- guaranteed space on the pole;
- preferential location on pole;
- no relocation and rearrangement costs; and
- numerous additional rights.[290]

FPL has therefore provided evidence of exactly the type of benefits received by AT&T and no other attachers that the Commission indicated would establish clear and convincing evidence sufficient to rebut the new telecom rate presumption.

Third, FPL has also shown that should the Commission look to the old telecom rate to establish an applicable rate here, the properly calculated old telecom rate is actually higher than the 1975 JUA rates. The properly calculated old telecom rates as set forth above would actually result in AT&T owning FPL a net payment of [redacted].[291]

[290] *See generally* Kennedy Dec.
[291] *Id.*, ¶ 38.

In sum, even if the *2018 Third Report and Order* applies to the 1975 JUA, the 1975 JUA rates are just and reasonable because they are lower than the old telecom rate.

B. AT&T Is not Entitled to The New Telecom Rate, but Even if It Were, The New Telecom Rate Must be Calculated Correctly.

FPL has established that the Third Report and Order's rebuttable presumption does not apply but that, even if it did, FPL has rebutted it by clear and convincing evidence. If, for some reason, the Commission finds it necessary to evaluate the new telecom rate for AT&T's attachments to FPL's poles, that rate should be properly calculated. The proper calculation of the new telecom rates for AT&T's attachments are as follows:[292]

Rate Year	New Telecom Rate
2014	
2015	
2016	
2017	
2018	

The proper calculation of the new telecom rates for FPL's attachments to AT&T's poles are as follows[293]:

Rate Year	New Telecom Rate
2014	
2015	
2016	
2017	
2018	

[292] Deaton Dec., ¶ 8.
[293] Deaton Dec., ¶ 11.

If despite all of the law and facts to the contrary, AT&T and FPL were required to pay one another using the the properly calculated new telecom rate formula for the years 2014-18, FPL would owe AT&T [redacted].[294] The 1975 JUA and its rates, therefore, must not be upended.

VII. Conclusion

Based on all of the foregoing, FPL asks that the Commission dismiss or deny AT&T's Complaint and the relief requested. On a retrospective basis, the Commission should not review or disturb the terms of the January 1, 1975 Joint Use Agreement that AT&T proudly proclaimed included a major change in space allocation and percentage ownership that AT&T sought and was "accepted by FP&L." On a prospective basis, there is nothing for the Commission to do, as FPL terminated AT&T's rights under the 1975 JUA.

FPL also states that it remains willing to engage in meaningful settlement negotiations that involve each party's respective corporate executives and which strike a sensible balance that recognizes the value that joint use arrangements provide.

WHEREFORE, Florida Power & Light Company respectfully requests that the Commission dismiss or deny AT&T's Complaint and the requested relief, and provide such other and further relief as the Commission deems just and proper.

[294] As discussed above, FPL disagrees with AT&T's argument that the applicable statute of limitations in this matter is five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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PUBLIC VERSION

RULE 1.721(M) VERIFICATION

I, Robert J. Gastner, as signatory to this submission, hereby verify that I have read this Brief in Support of FPL's Answer to AT&T's Amended Complaint and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

Robert Gastner

APPENDIX
ADMISSIONS AND DENIALS WITH RESPECT TO THE SPECIFIC FACTUAL ALLEGATIONS OF AT&T'S AMENDED COMPLAINT

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T Florida,	)	
	)	Proceeding No. 19-187
Complainant,	)	
	)	Bureau ID No. EB-19-MD-006
v.	)	
FLORIDA POWER & LIGHT COMPANY,	)	
Respondent.	)	

ANSWER

Pursuant to 47 CFR §1.726(b), Respondent Florida Power & Light Company ("FPL") responds as follows to the specific factual averments of BellSouth Telecommunications, LLC, d/b/a AT&T Florida ("AT&T").[1]

1. Upon information and belief, FPL admits that the allegations of Paragraph 1 are true.

2. FPL admits that the allegations of Paragraph 2 are true.

3. FPL admits: (1) that FPL and AT&T are parties to a joint use agreement ("JUA") dated January 1, 1975; (2) that this 1975 joint use agreement was last amended on or about June 1, 2007 to provide certain storm related protocols and a dispute resolution process; and (3) that FPL terminated the parties' 1975 JUA after receiving no payment under the agreement from AT&T for the calendar years 2017 & 2018. FPL states that: (1) as of 2018, the parties' jointly used network currently consists of approximately 631,124 poles in the overlapping areas served

[1] FPL incorporates herein its Brief in Support of its Answer to the Amended Complaint of Bellsouth Telecommunications, LLC, D/B/A AT&T Florida ("Answer Brief").

by FPL and AT&T; (2) as of 2018, FPL owned approximately 420,914 of those poles (66%), and (3) that AT&T owned approximately 213,210 (34%) of those poles.[2]

4. FPL denies that the Federal Communications Commission ("Commission" or "FCC") has jurisdiction over this dispute for four independent reasons: (1) the Commission has no statutory authority to regulate the rates, terms, and conditions of incumbent local exchange carrier pole attachments; (2) even assuming the existence of such statutory authority, any assertion of authority over the parties' 1975 JUA would be an *ultra vires*, impermissibly retroactive expansion of that authority; (3) the Florida Public Service Commission has, or may, have jurisdiction over this dispute; and (4) AT&T has not met the Commission's condition precedent of good-faith negotiations prior to filing this Complaint.

5. FPL admits that the state of Florida has not submitted to the FCC a filing that states it is taking jurisdiction over pole attachments pursuant to 47 USC 224(c)(2), but denies that this lack of "certification" necessarily means the state of Florida lacks jurisdiction over this particular dispute. The admission set forth above is made without prejudice toward FPL's right to seek the intervention of the Florida Public Service Commission, if necessary, to avoid a massive shift of the cost of the jointly used network to FPL's electric customers. In any event, the dispute between the parties involves at least four "buckets" of substantive issues: (1) the rates AT&T pays for access to FPL's poles; (2) the rates FPL pays for access to AT&T's poles; (3) AT&T's access rights to FPL's poles; and (4) FPL's access rights to AT&T's poles. At best, the Commission's jurisdiction extends only to the first of these four issues. The Commission should leave the parties' long-standing contract intact as the Commission expressed in its *2011 Pole Attachment Order*. FPL denies any remaining allegations in this paragraph.

[2] *See* Declaration of Thomas J. Kennedy, attached as Exhibit A ("Kennedy Dec."), at ¶ 35.

6. FPL denies that there is no other action between the parties currently pending in the Commission or any court or other government agency based on the same set of facts. On July 1, 2019, FPL filed a civil breach-of-contract complaint against AT&T in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. On July 22, 2019, AT&T removed the action to the U.S. District Court for the Southern District of Florida, West Palm Beach Division.[3] In its Complaint, FPL alleges that AT&T has breached the 1975 JUA entered into by both parties by failing to continue its contractually-obligated payments in the amount of approximately [redacted] for the 2017 and 2018 calendar years. The relief FPL seeks includes, but is not limited to, the following: 1) an injunction requiring AT&T to immediately remove its attachments from FPL's poles; 2) a declaration stating that AT&T owns the 5,320 poles on which AT&T's equipment remained attached after receiving notice of abandonment of said poles from FPL; and 3) a declaration that FPL no longer has any legal ownership and/or responsibility for said abandoned poles. The action is currently pending before the U.S. District Court for the Southern District of Florida, West Palm Beach Division.

FPL further denies that AT&T's Complaint does not overlap with any issue in a notice-and-comment rulemaking proceeding that is currently before the Commission. The Commission is currently considering a petition for reconsideration which raises, among other issues, the legality of the very rule upon which a portion of AT&T's Complaint is based.[4] The comment cycle in the above-referenced proceeding closed on November 19, 2018 and the Commission has not yet reached a decision. Moreover, the order adopting the rule upon which AT&T's

[3] *Florida Power & Light Co. v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, No. 9:19-cv-81043-RLR (S.D. Fla. 2019).

[4] Petition for Reconsideration of the Coalition of Concerned Utilities, In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018).

Complaint is based is currently under review in the United States Court of Appeals for the Ninth Circuit.[5]

7. FPL admits that the parties engaged in written communications regarding certain matters raised in AT&T's Complaint and further admits that the parties held face-to-face meetings regarding certain matters raised in AT&T's Complaint. However, FPL denies any remaining allegations in paragraph 7 and specifically denies that AT&T met its pre-filing obligations pursuant to 47 C.F.R. § 1.722(g). AT&T provided no specific details as to what it believed was the just and reasonable rate or what it believed it should pay for its occupancy of FPL's poles during the 2017 calendar year. Also, over the next several months of discussion in 2018, contrary to what the FCC had contemplated for pre-suit negotiations, AT&T never identified in writing the specific underlying allegations that would support its conclusion that the contractual rates were not just and reasonable or that it was entitled to either the new or pre-existing telecom rates.

8. FPL denies that AT&T "attaches to FPL's poles on terms and conditions that are materially comparable to those of 'a telecommunications carrier or a cable operator.'" AT&T attaches to FPL's poles on terms and conditions that materially advantage AT&T over its CATV and CLEC competitors. Chief among those material advantages are: (1) FPL has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate AT&T without any upfront capital cost to AT&T; and (2) FPL has contractually agreed that, even in the event of a termination, AT&T can remain attached to FPL's poles.

FPL also denies that it "continues to charge AT&T pole attachment rates significantly higher than the [new telecom] rates charged to similarly situated telecommunications attachers."

[5] *American Elec. Power Serv. Corp., et al. v. FCC*, Case No. 19-70490 (9th Cir).

First, FPL does not charge AT&T "pole attachment rates" at all. The parties operate under a joint use agreement which contains a specific formula for determining how the costs of the joint use network are shared. Second, even if the new telecom rate applied here (which it does not), it should be applied on a per foot basis to avoid discriminatory effect on CATV licensees.

9. FPL admits that the Commission revised its ILEC complaint rule in 2018 to create two rebuttable presumptions applicable to "pole attachment contracts" that are new or newly renewed" after the *2018 Third Report and Order*'s effective date of March 11, 2019. These presumption include: (1) that an ILEC is similarly situated to CATV and non-ILEC telecom carriers; and (2) that an ILEC may be charged a rate no higher than a rate determined in accordance with the Commission's telecom rate formula.[6] FPL denies that its 1975 JUA with AT&T is either a "pole attachment contract" or that it was "new or newly renewed" after March 11, 2019, the effective date of the FCC's *2018 Third Report and Order*. The 1975 JUA has an effective date of January 1, 1975, and was last revised with an effective date of June 1, 2007. Moreover, the 1975 JUA was terminated effective August 26, 2019 pursuant to FPL's termination of the agreement resulting from AT&T failure to make its required payments under the agreement for the previous two calendar years, and FPL is in the process of seeking an injunction to remove AT&T's facilities from its poles.

FPL denies that the 1975 JUA is "'newly renewed agreement' entitled to the [*2018 Third Report and Order*'s] presumption." It denies that it has not alleged any competitive benefit that could rebut the presumption, and it denies that the payments that AT&T is required to provide under the 1975 JUA competitively disadvantage it. If anything, AT&T is in a competitively

[6] As detailed more fully in its Answer Brief, FPL believes that the new ILEC complaint rule is arbitrary, capricious and inconsistent with the law.

advantageous position relative to other attaching entities. FPL denies any remaining allegations in paragraph 9.

10. FPL admits that, under the Commission's rules, similarly situated attachers should pay similar pole attachment rates for comparable access, but denies that AT&T is similarly situated to the attaching entities who pay the new telecom rate. FPL further denies that "AT&T is entitled to rate relief in this case." Moreover, FPL denies that the *2018 Third Report and Order*'s presumptions apply. Even assuming that presumption applies, FPL has provided the Commission with more than enough evidence to successfully rebut it.

11. FPL denies that the *2018 Third Report and Order*'s presumptions apply and denies that the 1975 JUA is a "newly renewed" agreement under that order. FPL admits that the "JUA's initial term expired on January 1, 1980," but denies that it has continued "in force thereafter," as it has been recently terminated due to AT&T failure to meet its payment obligations under the agreement. FPL further denies that because of an event that occurred in 1980, the parties' JUA is a "new or newly-renewed pole attachment agreement" and that the *2018 Third Report and Order*'s new presumptions should apply to this proceeding

12. FPL denies its termination of the 1975 JUA placed the agreement into "evergreen status" as that term is used in the *2018 Third Report and Order*. The 1975 JUA is not in evergreen status; it is terminated. In terms of contractual provisions, "evergreen" status refers to an indefinite renewal, pending termination by either party. The contractual language that AT&T mistakenly claims to be an "evergreen" clause is actually a perpetual license, exercisable at the licensee's option. *See* Article XVI of the JUA, attached as Exhibit 1 to AT&T's Complaint. Because FPL lacks the contractual ability to terminate AT&T's license with respect to any existing joint use poles (even for AT&T's failure to provide any payments under the agreement

for two years), there can be no "renewal" of the 1975 JUA with respect to existing joint use poles. In this situation (as it relates to AT&T's facilities on FPL's poles), it is FPL—not AT&T—that is "forced" to continue the relationship; AT&T is the only party with a choice in the matter. FPL thus again denies that the *2018 Third Report and Order*'s presumptions apply and that the 1975 JUA is a "newly renewed" agreement under that order.

13. FPL denies that AT&T is entitled to a "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)." FPL denies that AT&T paid FPL in 2017 and 2018. FPL denies that its base contract rates are excessively and unreasonably high. Even assuming that AT&T were entitled to such a rate, FPL denies that AT&T has calculated the rate properly.[7] Based on the information available to FPL, FPL asserts that the New Telecom Rate should be calculated as follows:[8]

Rate Year	New Telecom Rate
2014	[redacted]
2015	
2016	
2017	
2018	

14. FPL denies the allegations of Paragraph 14. FPL asserts that, in course of the parties' negotiations, FPL was never afforded the opportunity nor did FPL have the occasion to "rebut the presumption" or identify the "advantage that AT&T enjoys over its competitors." AT&T's implication that FPL failed to do so is a gross distortion of the parties' negotiations. As FPL repeatedly explained to AT&T, the 1975 JUA pre-dates both the *2011 Pole Attachment Order* and the *2018 Third Report and Order*, and neither order is applicable to such agreements.

[7] FPL also denies that AT&T's reference to the parties' joint use rates for transmission poles has any relevance for this proceeding.
[8] Declaration of Renae B. Deaton ("Deaton Dec."), ¶ 8.

At no time during the parties' negotiations did AT&T come close to making a compelling argument that either order applied to the parties' relationship nor did AT&T ever request that FPL "rebut the presumption."

15. FPL admits that Verizon Florida, LLC ("Verizon") filed a complaint against FPL, that the Commission's Enforcement Bureau found that Verizon had not met its burden of showing that the parties' agreement rates are unjust and unreasonable,[9] and that the Enforcement Bureau then dismissed Verizon's complaint against FPL without prejudice.[10] However, FPL fails to understand how this previous proceeding has any factual relevance to the instant matter or why AT&T referenced it in paragraph 15 of its Complaint. FPL denies the remaining factual averments of this paragraph. With respect to AT&T's assertion that FPL cannot supply evidence to rebut the *2018 Third Report and Order*'s new presumptions, FPL again notes that the Commission's new complaint procedures by their express terms do not apply to the parties' decades old agreement. However, FPL has supplied "clear and convincing" evidence along with its response to AT&T's Complaint to establish that AT&T is materially advantaged over other attaching entities. First and foremost, the plain language of the 1975 JUA rebuts any notion that AT&T is similarly situated to other attaching entities. In addition, FPL has submitted the testimony of FPL's witnesses, the analysis of Thomas Kennedy and the economic evaluation submitted by William Zarakas, and actual, current data regarding the parties' attachments to rebut the presumption in this case.[11]

16. FPL denies all of AT&T's averments in paragraph 16. A comparison between the parties' 1975 JUA and a license agreement is neither required nor appropriate in this proceeding.

[9] *In the Matter of Verizon Fla. LLC, Complainant*, 30 FCC Rcd 1140, 1147 (2015).
[10] *Id*. at 1150.
[11] *See* Kennedy Dec.; Declaration of William P. Zarakas ("Zarakas Dec."); Declaration of Robert Murphy ("Murphy Dec."); Declaration of Ronald J. Davis ("Davis Dec.").

However, FPL has supplied "clear and convincing" evidence along with its response to AT&T's Complaint to establish that AT&T is not similarly situated to other attaching entities. In the first sentence of paragraph 16, AT&T cites the *2011 Pole Attachment Order* for the proposition that "FPL must weigh and account for all of the different rights *and responsibilities* (of which there are many) placed on AT&T as compared to its competitors" (emphasis in original) and specifically quotes paragraph 216 n.654 of the *2011 Pole Attachment Order* as follows: "A failure to weigh, and account for, the different rights and responsibilities in 1975 JUA[s] could lead to marketplace distortions." However, the complete context of the *2011 Pole Attachment Order* completely undercuts AT&T's argument. In the quotations, the Commission was simply stating that giving ILECs the telecom rate would give ILECs an unfair advantage over other attaching entities.[12] To emphasize this point, the footnote quoted by AT&T also includes a lengthy acknowledgement of the many benefits to ILECs under 1975 JUAs, and, in fact, the Commission stated in the very next sentence following the sentence quoted by AT&T: "We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators."[13]

In addition, AT&T also avers that "after a JUA terminates" it "eliminates any possible 'prospective value' to an ILEC from many JUA terms." In response, FPL states AT&T's existing attachments have already benefited from all of the provisions of the 1975 JUA. The Commission has specifically noted this in the past.[14] Thus, this argument is specious because the specific provisions to which AT&T is referring relate to deployment.[15] Any existing attachment to which the rate will be applied prospectively has already been deployed, so it has already

[12] *2011 Pole Attachment Order*, 26 FCC Rcd 5240, 5335 (¶ 216, n.654).
[13] *Id*.
[14] *See In the Matter of Verizon Fla. LLC, Complainant*, 30 F.C.C. Rcd. 1140, 1148-49 (2015).
[15] Compl. ¶ 16 (citing ATT00068).

received preferential treatment under the parties' agreement. AT&T's right to deploy new attachments has been terminated, so there will be no new attachments for which AT&T will be prospectively charged the 1975 JUA's current adjustment rate without also benefiting from its favorable deployment benefits.

17. FPL admits that Section XIII.A.4 of the parties' JUA states that "Each Party shall continue to perform its obligations under the JUA pending final resolution of any Dispute, unless to do so would be impossible or impracticable under the circumstances."[16] FPL also admits that it terminated the parties' agreement and has taken steps to remove AT&T's equipment from FPL's infrastructure. FPL took both these steps due to lack of payment by AT&T. FPL denies the remaining allegations in this paragraph.

AT&T's Complaint completely fails to disclose the fact that AT&T refused to provide FPL with any compensation whatsoever under the 1975 JUA for two full calendar years' worth of rental payments. AT&T then mischaracterizes FPL's fully justified actions to recoup the [redacted] owed to it by AT&T as "unwarranted operational pressure on AT&T in an apparent effort to persuade AT&T to drop its justified request for just and reasonable rates."[17] AT&T's nonpayment had a substantial effect. FPL's customer rates are established on the basis of (a) FPL paying for its ownership share of the 1975 JUA costs; and (b) AT&T paying its ownership share. By AT&T unilaterally ceasing payment, it effectively asked FPL's customers to bear all of AT&T's ownership share. AT&T's implication that FPL's collection efforts were somehow linked to the parties' negotiations is simply not a good faith assertion. In a similar effort, AT&T also mischaracterizes FPL's collection efforts as evidence of FPL's superior

[16] *See* ATT00137 (JUA § 13A.4). FPL also asserts that AT&T and not FPL is the party that violated this provision of the parties' agreement due to its refusal to make payments under the agreement during the parties' dispute.
[17] Compl., ¶ 17.

bargaining power.[18] However, the fact that AT&T felt secure enough in its position relative to FPL to simply stop making payments under the parties' agreement disproves any notion that it lacks bargaining power to FPL. AT&T knows that its pre-filing self-help and refusal to meet its obligations under the 1975 JUA were unlawful. That is why it specifically drafted its Complaint to conceal these facts from the Commission.

Moreover, AT&T's assertion that "FPL has used its pole ownership advantage to try to forever charge AT&T exceptionally high, and annually increasing, rental rates" is contradicted by the allegations in AT&T's Complaint and the undisputed facts in this proceeding.[19] In contrast to AT&T's assertions, FPL has taken steps to sever AT&T's contractual obligations to FPL due to AT&T's unjustified self-help.[20] AT&T is the party that is fighting to continue receiving the benefits it negotiated for under the parties' contract, not the other way around.

In addition, AT&T's Complaint falsely claims that FPL refused to negotiate with respect to the 1975 JUA rate provisions.[21] On the contrary, AT&T was the party who refused to renegotiate the terms of the parties' agreement.[22] Moreover, as noted above, AT&T never provided FPL with any of the allegations or arguments that form the basis of its Complaint. In fact, AT&T never provided FPL with any sort of concrete proposal or specific objection to which FPL could respond.

18. FPL denies the allegations of this paragraph. As noted above, the *2018 Third Report and Order*'s rebuttable presumption and decisional framework do not apply to the 1975 JUA, which is not a "new" or "newly renewed" agreement. The issues raised in the Complaint must

[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *See, e.g., id.* ¶ 17; s*ee also id.* ¶ 27 ("FPL has not just refused to discuss just and reasonable rates . . . .").
[22] *See* ATT00197 (stating that "AT&T indicated at the December 7 meeting that AT&T had not and was not initiating re-negotiation of the rate. If AT&T does not want to renegotiate the rate, FPL must continue to rely upon the terms of the Agreement for calculating the rate.").

therefore be decided under the analytical framework of the *2011 Pole Attachment Order*. "We recognize that this divergence from past practice will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements."[23] "Until that time, for existing agreements, the 2011 Pole Attachment Order's guidance regarding review of incumbent LEC pole attachment complaints will continue to apply."[24]

The issue before the Commission thus becomes whether, under the *2011 Pole Attachment Order*, the Commission should engage in a review of the 1975 JUA rates, terms and conditions. It should not. The 1975 JUA meets every indicia the Commission has identified as precluding such a review. The 1975 JUA is a longstanding historic agreement that predates the *2011 Pole Attachment Order* by decades, AT&T did not have inferior bargaining power to FPL either in 1975 or recently, AT&T does not lack the ability to terminate or renegotiate the agreement, and the 1975 JUA rates are in fact generally lower than the old telecom rate.

19. FPL denies the allegations of this paragraph. FPL has established that the *2018 Third Report and Order*'s rebuttable presumption does not apply but that, even if it did, FPL has rebutted it by clear and convincing evidence.[25] If, for some reason, the Commission finds it necessary to evaluate the new telecom rate, that rate should be properly calculated. AT&T did not properly calculate the new telecom rate. Rather, the proper calculation of the new telecom rate is as follows:[26]

[23] 2018 Third Report and Order, ¶ 127 (internal citation omitted).
[24] *Id.*at n.478.
[25] FPL also again denies that AT&T's reference to the parties' joint use rates for transmission poles has any relevance for this proceeding.
[26] Deaton Dec., ¶ 8.

Rate Year	New Telecom Rate
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]
2018	[redacted]

20. FPL admits that the Commission's position has been that incumbent carriers such as AT&T have been entitled to a just and reasonable rate since July 12, 2011, but denies that the cost-sharing arrangement within the parties' 1975 JUA yields unjust or unreasonable rates. FPL also notes that AT&T apparently also considered the 1975 JUA to be "just and reasonable" until very recently. Despite its alleged rights under the law since July 12, 2011, AT&T did not take exception to the parties' 1975 JUA until August 21, 2018.[27] FPL denies that the presumptions from the *2018 Third Report and Order* apply to this proceeding; it denies that the parties' JUA is "the direct result of unequal bargaining power;" it denies that AT&T is "locked in by an evergreen provision" in the parties' JUA; it denies that AT&T does not receive "any net material benefits that advantage AT&T" over attachers; and FPL denies any remaining allegations in this paragraph.

21. FPL again denies that the parties' 1975 JUA is "not just and reasonable." FPL again disputes that either the Commission's preexisting or new telecom rate are relevant to this proceeding. FPL also disputes and denies AT&T characterizations regarding the extent to which the rates contained in the parties' 1975 JUA differ from the Commission's regulated rates. FPL calculates the preexisting telecom rate as follows:

[27] *See* Compl., Exhibit 5 (ATT00164).

Old Telecom Rate	2014	2015	2016	2017	2018
Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

The old telecom rates over time are indeed higher than the 1975 JUA rates for AT&T's attachments to FPL's poles, which are:

1975 JUA Rate	2014	2015	2016	2017	2018
Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

22. FPL admits that paragraph 22 accurately notes the base contract rates contained in the parties' agreement but denies the rest of the factual allegations in this paragraph. As an initial matter, AT&T bases its allegations regarding the pole space used by the parties' on the FCC's assumptions rather than actual evidence regarding space actually used by the parties. However, putting aside this point, AT&T's assertions that the space used by the parties on their respective poles is somehow related the parties bargaining power is wildly misplaced. The parties' 1975 JUA guarantees each party access to the other party's poles. The amount of space used does not need to be comparable because AT&T's and FPL's use of pole infrastructure is not comparable. They are not offering the same type of service; they are not attaching the same type of equipment to poles; they do not have the same space requirements; and they are not competitors. It makes sense for the Commission to pursue a policy of rate parity in the context of rates provided to two competitive LECs attached to the same pole as they are competitors with the same space needs. No such similar competitive or public policy concerns exist between AT&T & FPL, and the fact that two vastly different entities operating in two vastly different industries is hardly surprising let evidence of unequal bargaining power.

In addition, unlike cable television service providers and competitive LECs which have no statutory right to attach to FPL's infrastructure absent available capacity for them to do so, AT&T negotiated the contractual right to attach to FPL's infrastructure regardless of whether there is capacity or not. Without this contractual obligation, FPL would have constructed a pole network with no more capacity than it needs to provide electrical service.[28] Moreover, without another attaching entity's presence on a pole, FPL would have no need for a safety space on its pole and would not construct poles to include one.[29] Thus, in the context of the parties' relationship, AT&T is the cost causer of the safety space on the parties' poles and FPL's ratepayers should not be responsible for an expense incurred solely for AT&T's benefit.

23. FPL admits that the relative pole ownership percentages supplied by AT&T in paragraph 23 are accurate. However, FPL denies any further factual allegations contained in this paragraph. FPL again asserts that it does not possess any "market power" or "bargaining leverage" with respect to the parties' relationship nor did exercise any "market power" during the course of its negotiations with AT&T.[30] Contrary to AT&T's assertions, the absence of bargaining power on the part of FPL is evidenced by the course of negotiations between FPL and AT&T. In fact, AT&T was the party that refused to renegotiate the terms of the parties' agreement.[31]

Moreover, over the last five years, FPL has offered to purchase AT&T's poles and negotiate attachment rates and arrangements that would be comparable to what FPL provides to

[28] Kennedy Dec.¶ 7.
[29] *Id.*
[30] FPL also objects to AT&T reliance on the Verizon Virginia decision. As the reasoning provided in that order relies upon redacted portions of the record not available to either party in this proceeding, it is difficult to see how it could have any precedential value. *See Verizon Virginia, LLC and Verizon South, Inc., v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, 32 FCC Rcd 3750, 3764 (2017).
[31] *See* ATT00197 (stating that "AT&T indicated at the December 7 meeting that AT&T had not and was not initiating re-negotiation of the rate. If AT&T does not want to renegotiate the rate, FPL must continue to rely upon the terms of the Agreement for calculating the rate.").

non-ILECs.[32] However, AT&T was largely unresponsive to this offer. FPL's offers and AT&T's decisions to not accept them rebuts AT&T's accusations of abuse of market power for two reasons. First, AT&T's decision demonstrates that it finds more value in the 1975 JUA over what it would be afforded under lease arrangements provided by FPL to other attachers.[33] Second, FPL's behavior does not indicate that it was exerting bargaining power to force AT&T into continuing with the 1975 JUA. Instead, any impasse in negotiation stems from AT&T's preference for retaining the 1975 JUA pole attachment while also demanding that it pay the rate associated with a differently situated pole attachment arrangement (*i.e.*, under the non-ILEC telecom rate).[34]

In addition, relying on the percentage of pole ownership as a primary indicator of bargaining power is misleading.[35] Joint pole ownership involves mutual dependence on pole access, which differs significantly from the buyer / seller relationships underlying traditional market power analysis (*i.e.*, where buyers of a service are also not sellers of the same service). FPL would have been significantly harmed by foreclosure of access to the 40% of joint use network poles that were owned by AT&T in 1975, and will likewise be harmed by foreclosure of access to the 34% of that are currently owned by AT&T.[36] It would be irrational for FPL to engage in a game of brinksmanship with AT&T, irrespective of any potential differences between FPL and AT&T in harm associated with loss of the 1975 JUA. [37]

24. FPL again notes that it is not the party in this proceeding who refused to renegotiate the rates in the parties' agreement. FPL also denies AT&T's assertion that it lacked

[32] Kennedy Dec., ¶ 36.
[33] Zarakus Dec., ¶ 24 .
[34] *Id*.
[35] Zarakus Dec., ¶ 25 .
[36] *Id*.
[37] *Id*.

the ability to terminate the parties' agreement prior to FPL's termination of the agreement. The fact that AT&T simply refused to make any payment whatsoever for two calendar years belies any such notion. In addition, as noted above, FPL has offered to purchase AT&T's pole infrastructure and then allow AT&T to simply attach as a licensee.[38] AT&T did not express any interest in such an arrangement. In any event, AT&T's argument is now moot as the parties' agreement is in fact terminated as a direct result of AT&T's gamesmanship.

25. Paragraph 25 again consisted merely of vague, unsupported legal conclusions that are repeated elsewhere in AT&T's Complaint. To the extent that a response is required, FPL denies that any factual allegations contained in this paragraph and has addressed the legal arguments in depth in the body of its response.[39]

26. FPL again denies the assertions that it refused to engage in negotiations regarding the terms of the parties' 1975 JUA, it denies that the rates contained in the parties' 1975 JUA "far exceed the new telecom rate," and it denies that the terms and conditions of the parties' 1975 JUA are not just reasonable. FPL has also explained to AT&T on many occasions that the 1975 JUA's references to "federal law" has nothing to do with the agreement's rate but rather concerns compliance of the poles (*e.g.*, compliance with the National Electrical Safety Code).[40] Nothing in the JUA suggests otherwise.[41]

27. FPL again denies the assertions that it refused to engage in negotiations regarding the terms of the parties' 1975 JUA. The correspondence cited by AT&T for this

[38] Kennedy Decl., ¶ 36.
[39] Answer Brief at 21-42.
[40] *See* ATT00196.
[41] AT&T's Complaint selectively quotes Article VI of the parties' agreement. The full text is as follows: "Joint use of poles covered by this Agreement shall at all times be in conformity with all applicable provisions of law and the terms and provisions of the Code in its present form or as subsequently revised, amended or superseded. Said Code, by this reference, is hereby incorporated herein and made a part of this Agreement." *See* ATT00119. In turn, the agreement defines "the Code" as the "National Electrical Safety Code." *See* ATT00110.

proposition specifically notes that AT&T was the party that refused to renegotiate the rate or comply with the Commission's pre-complaint filing procedures.[42] FPL further asserts that AT&T is the party that violated the JUA's pre-complaint dispute resolution provision due to AT&T's failure to provide the required payments under the parties' agreement.[43] FPL's subsequent invocation of the agreement's termination provisions is in no way a violation of any of its obligations under the agreement.[44] FPL admits that it has restricted AT&T's right to access FPL's poles and terminated the parties' 1975 JUA but only because AT&T unilaterally stopped making payments under the parties' agreements even as to the portion of its required payments that it was not disputing.

28. FPL denies that AT&T is entitled to the new telecom rate. The *2018 Third Report and Order* specifically notes that its new presumptions and complaint resolution procedures are limited to new or newly renegotiated agreements, and the parties' 1975 JUA is neither.[45] Similarly, the parties' 1975 JUA predates the *2011 Pole Attachment Order* by several decades and is exactly the type of longstanding agreement that the Commission said it would not disturb.[46]

29. FPL denies that AT&T is entitled to the new telecom rate. The *2011 Pole Attachment Order* stated that similarly situated attachers should receive similar rates.[47] However, it explicitly limited this holding to "new" agreements.[48] As the parties' 1975 JUA predates the *2011 Pole Attachment Order* by several decades, the language relied upon by AT&T

[42] *See* Compl., n.73 (citing ATT00196-197 - Email from D. Bromley, FPL, to D. Miller, AT&T (Dec.20, 2018); ATT00215-216 - Letter from M. Jarro, FPL, to AT&T (Jan. 28, 2019)).
[43] *See* ATT00137 (JUA § 13A.4).
[44] *See* ATT00249-250.
[45] *See 2018 Third Report and Order*, ¶ 126.
[46] *See 2011 Pole Attachment Order* ¶ 216.
[47] *Id*. ¶ 217.
[48] *Id*.

from the *2011 Pole Attachment Order* does not apply to the parties' agreement. Moreover, even if it did apply, FPL has amply demonstrated that AT&T is materially advantaged by the parties' 1975 JUA relative to other attachers.[49]

30. FPL denies that it has "ignored those aspects of the JUA that disadvantage AT&T as compared to its competitors" because there are none. AT&T asserts that its alleged disadvantages are as follows: (1) AT&T's guaranteed position as the lowest attaching entity on a pole; and (2) the fact that AT&T owns poles.[50] However, neither of these alleged disadvantages has anything to do with the JUA but rather stem from voluntary choices that AT&T made (presumably motivated by self-interest). With respect to the allegations regarding AT&T's position on FPL's poles, the flexibility of its contractually guaranteed space allows AT&T easy and unencumbered access to the pole, quick construction methods and elimination of any need to wait for any other attacher to do make-ready.[51] In contrast, because AT&T typically does not attach at the lowest possible point on the pole, other attachers often must ask for permission to attach below AT&T or pay AT&T to move and wait for it to do so. This causes cost and delay to other telecom providers which AT&T does not experience.[52] Finally, despite AT&T's claims that attaching at the lowest space on the pole is actually not preferred, AT&T has never asked FPL to attach anywhere else on the pole.[53] Indeed, the FCC's recent one-touch make ready rules make clear that the FCC itself believes there is great value in avoiding make-ready delays and facilitating the rapid deployment of communications facilities in the public interest.[54] Moreover,

[49] Answer Brief at 46-58; Kennedy Dec. ¶ 7-27.
[50] *See* Ex. C to the Compl. at ATT00069 (Peters Aff. ¶ 11); Ex. D to the Compl. at ATT00090 (Dippon Aff. ¶ 35).
[51] *Id.*, ¶ 20.
[52] *Id.*, ¶ 13. While the FCC's one-touch make-ready process may ameliorate this issue somewhat, subsequent attachers are still going to have to pay make-ready fees to have AT&T move. *Id.*
[53] *Id.*, ¶ 20.
[54] *See 2018 Third Report and Order*.

FPL is unaware of any accidents necessitating AT&T's replacement of a joint use pole caused by AT&T's attachment position on the pole.[55]

With respect to AT&T's allegation that ownership of poles is a "disadvantage," the fact that AT&T owns poles has nothing to do with the 1975 JUA. AT&T no doubt owned poles long before entering into the 1975 JUA. The 1975 JUA allowed AT&T to reduce or avoid the cost of pole ownership.[56] The 1975 JUA allows AT&T to own as many or as few poles as it wishes. However, to the extent that the pole ownership percentage of the parties deviates from the percentage goals that AT&T requested in 1975,[57] the party not meeting its goal must compensate the other party for the increased burdens the other party must bear due to its increased ownership percentage.[58] As AT&T notes, it has allowed the percentage of poles that it owns to decrease vis-à-vis FPL since the inception of the 1975 JUA.[59] Thus, notwithstanding its claims to the contrary, AT&T clearly finds paying FPL pursuant to the 1975 JUA preferable to installing and maintaining its own poles. Thus, the disadvantage that AT&T identifies is actually a set of costs that are completely independent of AT&T's relationship with FPL, and AT&T's argument actually bolsters the notion that one of the key benefits of the 1975 JUA is that it allows AT&T to avoid or reduce these costs (particularly since AT&T has no statutory right to attach to utilities' pole infrastructure).

Moreover, AT&T's arguments in this respect are also undercut by AT&T's claims in the same Complaint that it is disadvantaged by not owning poles.[60] In fact, the alleged disadvantages of not owning enough poles was the entire basis for which the Commission's

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[55] Kennedy Decl., ¶ 20.
[56] *See* Zarakas Dec. ¶ 27.
[57] *See* Kennedy Decl. ¶ 33.
[58] *Id.*
[59]
[60] *See* Compl. ¶ 23.

original assertion of jurisdiction over joint use relationships in 2011.[61] AT&T is trying to argue out of both sides of its mouth. AT&T knows that the 1975 JUA acts as a self-serving net benefit and that the 1975 JUA provides it with material benefits in relation to other attaching entities. That is why AT&T refused to sell its poles when FPL made an offer to buy them. This fact alone makes clear that what AT&T is seeking in the proceeding is not parity with other attachers but rather even further advantage than it already has. FPL denies all the remaining factual allegations in Paragraph 30.

31. FPL denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis. As set forth above, FPL has already offered AT&T to purchase AT&T's poles and let it attach under a pole license agreement. If AT&T was truly interested in paying the new telecom rate (while not receiving any of the material benefits afforded it under the JUA), it could have simply accepted this offer. It did not. Nonetheless, AT&T's calculations of FPL's CATV and CLEC pole attachment rates for the period 2014-2019 are inaccurate.

32. FPL denies that AT&T is entitled a "refund [of] the [redacted] that AT&T has paid in excess of the just and reasonable rate."[62] AT&T seeks relief that the *2018 Third Report and Order* expressly prohibits. In issuing the *2018 Third Report and Order*, however, the FCC expressly denied ILECs' request for "'the right to refunds for Complaint overpayments as far back as the statute of limitations allows.'"[63] Thus, AT&T disregards the plain language of the *2018 Third Report and Order* and requests a form of relief that the Commission expressly foreclosed.

[61] *See* 2011 Pole Attachment Order, ¶¶ 199, 206.
[62] Compl., ¶ 32.
[63] *2018 Third Report and Order*, n.478 (internal citation omitted).

AT&T also asserts that the "applicable statute of limitations" is the five-year statute of limitations in Fla. Stat. § 95.11(2)(b) for a breach of contract claim. However, the Commission has never explained what it meant by the "applicable statute of limitations" for purposes of Rule 1.1407(a)(3). Given that AT&T's Complaint most certainly is not a breach of contract action, and given that AT&T's claim most certainly does not sound in Florida law, Florida's statute of limitations for a breach of contract does not apply.[64] A more appropriate statute of limitations, if this concept has any relevance at all to this proceeding, would be the two-year statute of limitations in 47 U.S.C. § 415.[65]

33. FPL denies that AT&T has overpaid FPL and denies that it collected any amount "in violation of federal law." If this were the case, AT&T would certainly have raised the issue prior to August 21, 2018. FPL further denies that a refund would be "consistent with the

[64] AT&T cites the *Verizon Virginia* decision as supporting the application of a breach of contract statute of limitations, but this is not what *Verizon Virginia* says. *See* AT&T Pole Attachment Compl. ¶ 32. Importantly, the Commission made no finding regarding the "applicable statute of limitations" in that case. The Commission merely noted that Verizon contended that the applicable statute of limitations was a 5-year breach of contract limitations period and that the defendant in that case did not dispute that contention. *See Verizon Virginia, LLC and Verizon South, Inc., v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, 32 FCC Rcd 3750, 3764 (2017).

[65] *See e.g., American Cellular Corporation and Dobson Cellular Systems, Inc. v. BellSouth Telecommunications, Inc.*, 22 FCC Rcd 1083, 1083 (2007) (dismissing complaint filed under Section 208 for alleged over-billing as time barred under Section 415's two-year statute of limitations); *Michael J. Valenti and Real Estate Market Place of New Jersey t/a Real Estate Alternative v. American Telephone and Telegraph Company and MCI Telecommunications Corporation*, 12 FCC Rcd 2611, 2623 (1997) (denying applications for review and finding the Common Carrier Bureau properly dismissed complaints filed pursuant to Section 208 as time barred by Section 415's two-year statute of limitations); *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. ALASCOM, Inc.*, 4 FCC Rcd 2472, 2477 (1989) (dismissing claims filed pursuant to Section 208 as time-barred under Section 415's two-year statute of limitations).AT&T cites a 9th Circuit case for the notion that "[**w]hen there is no statute of limitations expressly applicable to a federal statute**, …. 'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.'" Compl. ¶ 32, n. 90 (citing *Hoang v. Bank of Am.*, N.A., 910 F.3d 1096, 1101 (9th Cir. 2018)) (emphasis added). However, given the fact that the Communications Act clearly has a two year statute of limitations that it has repeatedly applied to complaint proceedings in the past, it hard to see the relevance of this case.

Commission's intention." In fact, as set forth above, a refund would be specifically contrary to the Commission's intention.[66] AT&T's contention that a failure to award a refund "discourages pre-complaint negotiations between the parties" is also directly contradicted by AT&T's own actions in this matter. AT&T did not raise any sort of objection regarding the parties' 1975 JUA in 2011 but rather waited until 2019 to file the Complaint. Moreover, prior to initiating this proceeding, AT&T never provided FPL with the basis of its Complaint as it is required to do under the Commission's rules, and it consistently maintained that it was not interested in renegotiating the 1975 JUA's rate. Nothing in AT&T's pre-complaint behavior evidences a sincere desire to resolve the parties' differences. Rather, AT&T engaged in months of self-help and gamesmanship that the Commission should in no way reward. FPL denies any remaining allegations in paragraph 33.

34. FPL adopts and incorporates paragraphs 1 through 33 as it fully set forth herein.

35. FPL denies that the Commission is "statutorily required to ensure that the pole attachment rates that FPL charges AT&T are just and reasonable." In fact, until 2011, the Commission interpreted the Act as prohibiting the regulation of the rates, terms and conditions of ILEC attachments on electric utility poles.[67] In fact, the parties' long-established arrangement is just the type of agreement that the Commission in 2011 stated it was unlikely to disturb.[68] Even assuming *arguendo* that the Commission's authority extends to attachments made by incumbent

[66] FPL also notes that the much of the relief sought by AT&T is barred by the judicial prohibition on the retroactive application of federal agency rules. Answer Brief, at 21-32.
[67] See *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6781 (1998).
[68] *See 2011 Pole Attachment Order*, ¶ 216.

carriers, the Commission most certainly is not "statutorily required" to regulate the parties' relationship.

36. FPL denies that the allocation of space and resulting rental rate provisions of the 1975 JUA are unjust, unreasonable, or otherwise in violation of the Pole Attachments Act. To the contrary, the cost-sharing provisions are just, reasonable, and were in fact originally proposed by AT&T. Moreover, as set forth above, even if AT&T were afforded a "per foot" rate consistent with the Commission's preexisting telecom rate, it would generally yield a rate higher than the rates yielded by parties' 1975 JUA.[69]

37. The just and reasonable rate for AT&T's attachments to FPL's poles is the rate calculated in accordance with the parties' 1975 JUA. But in the event the Commission applies the new telecom rate to AT&T's attachments to FPL's poles, it should be applied on a per foot basis in order to avoid discriminating against FPL's CATV pole licensees. Based on the data available to FPL regarding AT&T's actual occupancy levels and the new telecom rate calculation inputs, the following per pole rates would apply to AT&T for years 2014 through 2018:[70]

Rate Year	New Telecom Rate
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]
2018	[redacted]

[69] Deaton Dec., ¶ 9.
[70] *Id.*, ¶ 8.

The proper calculation of the new telecom rate for FPL's attachments to AT&T's poles are as follows:[71]

Rate Year	New Telecom Rate
2014	[redacted]
2015	[redacted]
2016	[redacted]
2017	[redacted]
2018	[redacted]

If despite all of the law and facts to the contrary, AT&T and FPL were required to pay one another at the properly calculated new telecom rate for the applicable statute of limitations, FPL would owe AT&T far less than what it has contended in its Complaint. The 1975 JUA and its rates, therefore, must not be upended.

38. As explained above, the pre-existing telecom rate formula cannot serve as a "cap" on the rate for existing joint use poles owned by FPL because this "cap" applies (if at all) only to agreements "entered into or renewed" after March 11, 2019, which would not apply to the parties' 1975 JUA. But even if the pre-existing telecom rate formula is a "cap" it would yield the following rates based on the data available to FPL regarding AT&T's actual occupancy levels and the preexisting telecom rate calculation inputs:[72]:

Old Telecom Rate	2014	2015	2016	2017	2018
Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

The old telecom rates over time are indeed higher than the 1975 JUA rates for AT&T's attachments to FPL's poles, which are:

[71] *Id.*, ¶ 11.
[72] Deaton Dec., ¶ 9.

1975 JUA Rate	2014	2015	2016	2017	2018
Rate per distribution pole (base contract rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

In fact, "[i]f AT&T and FPL each paid one another an attachment rate at the properly calculated pre-existing telecom rate for the statute of limitations that AT&T asserts is applicable to this proceeding, AT&T would owe FPL [redacted]."[73] Thus, FPL denies that AT&T is entitled to any sort of refund and denies any remaining allegations in paragraph 38.

39. The Commission should deny AT&T's request "that the Commission find that FPL charged and continues to charge AT&T unjust and unreasonable rates in violation of federal law." As set forth above, the cost-sharing provisions in the existing 1975 JUA that AT&T now challenges not only are just and reasonable but also are a result of AT&T's own proposals with respect to the JUA's allocation of space and resulting rental rate.

40-41. The Commission should deny AT&T's request that the Commission establish different rates, effective as of the 2014 rental year, especially given that AT&T never objected to the parties' 1975 JUA until August 21, 2018. But in the event the Commission unwinds the cost-sharing provisions of the 1975 JUA, any alternative rates that it sets should be consistent with the rates set forth in FPL's Response.[74]

42. The Commission should deny AT&T's request for a refund in this case beginning with the 2014 rental year because (a) the cost-sharing provisions in the existing 1975 JUA are just and reasonable; and (b) AT&T never objected to those cost-sharing provisions until August 21, 2018.

In addition to denying the relief sought by AT&T, the Commission should also award to

[73] Kennedy Dec., ¶ 38.
[74] Answer Brief, at 66-71.

FPL such relief as the Commission deems necessary, just and reasonable.

AFFIRMATIVE DEFENSES

FPL, in accordance with Rule 1.1726(e), adopts and incorporates the facts set forth above and separately pleads the following affirmative defenses.

A. Estoppel and Unclean Hands

As noted in FPL's Answer Brief, Section IV.A, FPL denies that the Commission should order a refund of any amounts to AT&T. The facts of this case clearly demonstrate that the cost-sharing provisions in the existing 1975 JUA are just and reasonable—if not favorable to AT&T. Moreover, despite the parties' 1975 JUA being in place for several decades, AT&T did object to the 1975 JUA until August 3, 2018 and, despite months of discussion, did not provide any actual notice to FPL of the objections to the 1975 JUA that it raises in this proceeding until the filing of its Complaint with the Commission. Given this fact alone, AT&T should be estopped from claiming or obtaining any sort of retroactive relief involving any refund prior to the filing of its Complaint.

B. Failure to Comply with the Good-Faith Negotiation Requirement Set Forth in Rule 1.722(g).

As noted in AT&T's Brief, Section III A, AT&T failed to fulfill its pre-filing regulatory obligations to provide FPL with the specific allegations of its Complaint. AT&T's "good faith certification" to the contrary is knowingly misleading. AT&T's Complaint must therefore be dismissed. 47 C.F.R. §1.722(g) requires that the complainant in pole attachment complaint proceedings notify each defendant in writing of the allegations that form the basis of the Complaint and invite a response within a reasonable period of time.

Despite this clear mandate, and despite AT&T's certifications to the contrary, AT&T provided FPL no advance written notice of the vast majority of the allegations in its Complaint.[75] In fact, FPL learned of them for the first time on July 1, at the same time as this Commission. Because of AT&T's failure to comply with Rule 1.722(g), FPL was deprived of the chance to review and understand AT&T's allegations which form the basis of the Complaint, to respond fully and in writing to those allegations, and to engage in meaningful pre-complaint settlement discussions. AT&T simply withheld the critical allegations set forth in its Complaint throughout the entire pre-Complaint process. Moreover, AT&T engaged in a tactical plan to delay substantial payments to FPL for as long as possible without identifying the specific bases for its claim. This scheme allowed AT&T to unfairly: (1) enjoy the benefit of keeping in its coffers substantial payments that belonged to FPL for a substantial period of time;[76] and (2) place FPL at a severe disadvantage in defending this action, as FPL saw AT&T's allegations for the first time in the Complaint with no opportunity to discuss them with AT&T. Had AT&T complied with Rule 1.722(g), neither FPL nor the Commission would be in the positions they are now. The parties could have exchanged written documentation allowing them to engage in fully-informed and meaningful discussions, and significantly narrowed or eliminated entirely the need for this proceeding.

[75] *See* Bromley Dec., ¶ 10.

[76] As of July 1, 2019, the date FPL finally received payment for the rent due for the calendar years of 2017 and 2018, the interest charges on these severely delinquent FPL invoices are in the total amount of [redacted]. AT&T employed these same tactics with Alabama Power, ignoring large invoices for a substantial period of time only to pay them right before filing its FCC Complaint. *See* Pole Attachment Complaint, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002 (filed Apr. 22, 2019). If AT&T is employing this tactic across the country, AT&T is prospering on bad faith tactics by utilizing the withholding of payments to leverage a settlement that should not be condoned by the FCC.

C. AT&T's Claim for Relief under the Commission's new ILEC complaint rule fails to state a claim upon which relief can be granted because the 1975 JUA at issue was not "entered into or renewed" after the effective date of the rule.

As detailed more fully in FPL's Answer Brief, Sections IV and V, both orders on which AT&T's Complaint relies, the *2011 Pole Attachment Order* and the *2018 Third Report and Order*, specifically note that their relevant provisions should not be applied to long-standing, historic agreements between utilities and incumbent LECs. The parties' 1975 JUA is such an agreement. As noted previously, the 1975 JUA was initially negotiated more than four decades ago and amended in 2007, well before any of the Commission decisions to which AT&T cites.[77] The parties' 1975 JUA was comprehensively negotiated in arms-length fashion, requiring compromise by both parties. Selectively rewriting one aspect of it in favor of AT&T is unjust and unreasonable and will negatively impact FPL, its electric customers, and the communications industry.

D. The Commission should exercise forbearance in this proceeding.

The Commission should exercise forbearance in this proceeding because the Commission's justifications for the assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not supported by the facts in this case. Section 10 of the Communications Act, 47 U.S.C. § 160, requires the Commission to forbear from applying to a telecommunications carrier any Communications Act provision or Commission regulation if certain statutory criteria are met.[78] Specifically, the Commission must forbear where: (1) the enforcement of a regulation is not necessary to ensure that the charges for a telecommunications carrier are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the

[77] *See* Complaint, ¶ 3.
[78] *See* 47 USC § 160(a).

protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[79] As shown in FPL's Brief, in the instant situation, AT&T was not and is not in an inferior bargaining position to FPL; the 1975 JUA rate is less than the Old Telecom rate and comparable to the New Telecom Rate, and the 1975 JUA rates are just and reasonable because the 1975 JUA provides net value to AT&T that far exceeds AT&T's net payments under the Agreement. Thus, application of the Commission's pole attachment regulatory framework to the 1975 JUA is neither necessary nor in the public interest, and the Commission should forbear from doing so.

E. The Commission should waive the applicability of Rule 1.1413 pursuant to its authority under Rule 1.3.

Even if the Commission finds that is not compelled to forbear from applying Rule 1.1413 and its predecessor rule to this proceeding, the Commission should waive the applicability of said rules pursuant to Rule 1.3. Rule 1.3 provides in relevant part:

> The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.[80]

As noted above, given the established facts in this proceeding, applying the Commission's pole attachment regulatory framework to the JUA would not further any public policy goal of the Commission nor remedy any legitimate inequity with respect to the Complainant. Thus, good cause exists to waive the application of Rule 1.1413 and its predecessor rule to this proceeding.

[79] *See Id.*
[80] 47 C.F.R. § 1.3.

F. The Commission Cannot Lawfully Put the Burden of Proof on FPL as the Respondent.

The *2018 Third Report and Order* creates a presumption for complaint proceedings initiated by incumbent LECs that incumbent LECs are "entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers."[81] However, this presumption impermissibly shifts the burden of proof in these proceedings from the party seeking relief to the respondent.[82] The issue of what constitutes permissible rates, terms, and conditions in a joint-use agreement is the key issue of such proceedings and cannot be appropriately characterized as an affirmative defense or exemption. Moreover, AT&T has not pointed to any statutory authority allowing the Commission to shift the burden of proof between the parties in a pole attachment proceeding.

G. The "sign and sue" rule is unlawful.

The Commission's rule allowing entities to "sign and sue" violates the Act's plain meaning and is arbitrary and capricious.[83] Attaching parties should be required to take exception to the terms and conditions of an agreement when the attachment agreement is negotiated, or estopped from filing a complaint about those terms after the agreement is executed. Under the Commission's current rules, attachers can keep the benefit of their bargains as they see fit and simultaneously seek to avoid disfavored provisions. The Commission's decision to displace

[81] *2018 Third Report and Order*, ¶ 127.
[82] *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S. Ct. 528, 534, 163 L. Ed. 2d 387 (2005); *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 271, 114 S. Ct. 2251, 2254–55, 129 L. Ed. 2d 221 (1994).
[83] *S. Co. Servs. v. F.C.C.*, 313 F.3d 574, 583–84 (D.C. Cir. 2002) does not foreclose this argument. FPL is entitled to challenge the Commission's order in this as-applied basis, given that the specific circumstances demonstrate the arbitrary and capricious error of exercising jurisdiction over joint use rates. Moreover, the DC Circuit in the *Southern Company* case was not examining the complaint resolution procedures for ILECs imposed by the Commission's more recent orders.

long-standing, complex, arm-length negotiated agreements between utilities and incumbent LEC attachers is well outside of anything contemplated by the Act. In particular, adoption of the preexisting telecom rate formula as a "hard cap" on what electric utilities can recover from ILECs in situations where an electric utility has proven that the ILEC gains access to its poles on terms and conditions that materially advantage it vis-à-vis CATV and CLEC licensees is arbitrary and capricious because it cannot account for the variety of scenarios that might exist in a joint use agreement between an ILEC and an electric utility. Rather than evaluate the reasonableness of each joint use agreement on a case-by-case basis as the Commission had proposed in the past, imposing a one-size-fits-all ceiling for joint use rental rates will deprive utilities of justified compensation for contractual concessions and create a competitive disadvantage for other entities not involved in this proceeding, namely other parties attached to FPL's poles.

H. The Commission's assertion of jurisdiction over ILEC Attachments is unlawful, ultra vires, arbitrary, capricious and unreasonable.

AT&T's Complaint seeks relief that the Commission is unable to provide because the Pole Attachments Act does not provide the Commission with jurisdiction. Section 224(b)(1) of the Communications Act provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[84] The statute defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[85] However, Section 224(a)(5) of the Communications

[84] 47 U.S.C. § 224 (b)(1).
[85] *Id.* § 224(a)(4).

Act makes clear that "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in Section 153 of this title) does not include any incumbent local exchange carrier as defined in Section 251(h) of this title."[86]

A "provider of telecommunications service" is synonymous with "telecommunications carrier" under Section 153(44) of the Communications Act, which means that ILECs are, under that general definition, telecommunications carriers. However, as noted above, all such carriers are not telecommunications carriers for the purposes of Section 224. Thus, since ILECs cannot be considered carriers under Section 224, and all carriers are providers under Section 153, ILECs also must not be considered as providers of telecommunications services for purposes of Section 224. Given the plain meaning of the Communications Act, ILECs are specifically excluded from the Commission's jurisdiction to regulate attachments under Section 224.[87]

I. Rule 1.1413(b) Constitutes Arbitrary and Capricious Rulemaking by the FCC.

Prior to 2011, the FCC's position had always been that ILECs had no rights as attaching entities under the Pole Attachments Act.[88] In 2011, for the first time, the FCC asserted that it *did*, in fact, have jurisdiction over the rates, terms, and conditions for ILEC attachments on electric utility poles, but stated:

> …we recognize the need to exercise that authority in a manner that accounts for the potential **differences between incumbent LECs and telecommunications carrier or cable operator attachers**. . . . We therefore decline at this time to adopt

[86] *Id.* § 224(a)(5).
[87] *American Elec. Power v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) does not foreclose this argument. FPL is entitled to challenge the Commission's order in this as-applied basis, given that the specific circumstances demonstrate the arbitrary and capricious error of exercising jurisdiction over joint use rates. *See, e.g., Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012) (we "preserve the right of complainants to bring as-applied challenges against any alleged unlawful applications [of agency rules]"); *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005) (we have jurisdiction to review an as-applied challenge).
[88] *See, e.g.*, 1998 Order, 13 FCC Rcd. at 6781, ¶ 5 ("Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier … the ILEC has no rights under Section 224 with respect to the poles of other utilities.") (emphasis added).

> comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.[89]

In the *2018 Third Report and Order*, the FCC changed its position again by no longer acknowledging the differences between incumbent LECs and telecommunications carrier or cable operator attachers and instead adopting a presumption that ILECs are "similarly situated to" CLECs or CATVs "for purposes of obtaining comparable rates, terms, or conditions."[90] The FCC's shifting interpretations of the "rates" to which ILECs are entitled under § 224 constitute arbitrary and capricious decisions making.[91] *Marmolejo-Campos*, 558 F.3d at 919-20.

The *2018 Third Report and Order* states that "If the presumption we adopt today is rebutted, the pre-*2011 Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate."[92] There, the Commission stated it was adopting a "hard cap" even where electric utilities rebut the presumption that an ILEC is similarly situated to CLEC or CATV attachers because "we agree with commenters that establishment of . . . an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation."[93]

Adopting the preexisting telecom rate formula as a "hard cap" on what electric utilities can recover from ILECs in situations where an electric utility has proven that the ILEC gains access to its poles on terms and conditions that materially advantage it vis-à-vis CATV and CLEC licensees is arbitrary and capricious because it cannot account for the variety of scenarios that might exist in a 1975 JUA between an ILEC and an electric utility. For example, a "hard cap" could result in the electric utility recovering less than the incremental cost attributable to the

[89] *2011 Pole Attachment Order*, ¶ 214 (emphasis added).
[90] Rule 1.1413(b).
[91] *Marmolejo-Campos*, 558 F.3d at 919-20.
[92] *2018 Third Report and Order*, ¶ 129.
[93] *Id.* (internal citations and quotation marks omitted).

ILEC, a result that would be at odds with the Act.[94] In fact, the Commission stated that this was why it did not establish a rate or formula when it first asserted jurisdiction over this relationship in 2011.[95] Furthermore, the *2018 Third Report and Order* did not provide sufficient justification for the imposition of the preexisting telecom rate formula as a "hard cap" where electric utilities rebutted the Section 1.1413 presumption. The Commission did not provide an actual analysis to determine whether the preexisting telecom rate formula would yield sufficient recovery in all instances. Rather, the Commission asserted that the adoption was necessary because it would provide certainty in negotiations and reduce the number of complaint proceedings.[96] Again, the Commission's continually shifting positions with respect to the regulatory treatment of ILECs has resulted in a series of arbitrary and capricious rulemakings.

J. The applicable statute of limitations bars some or all of AT&T's claims.

AT&T's Complaint appears to presume that the "applicable statute of limitations" is the five-year statute of limitations in Fla. Stat.§ 95.11(2)(b) for breach of contract.[97] The Commission, though, has never explained what is meant by the "applicable statute of limitations" for purposes of Rule 1.1407(a)(3). Given that AT&T's Complaint most certainly is not a breach of contract action, and given that AT&T's claim most certainly does not sound in Florida law, it is insensible to apply Florida's breach of contract statute of limitations.[98] A more

[94] *See Gulf Power Co. v. FCC*, 208 F.3d 1263, 1272 (11th Cir. 2000) (*rev'd* on other grounds), (citing 47 U.S.C. § 224(b), (d)(1)) ("Under the 1996 Act, the lowest rent that may be considered just and reasonable is an amount equal to the incremental cost of adding the new attachment to the utility's pole…").
[95] *2011 Pole Attachment Order*, ¶ 214 (noting the "complexities" in the joint use relationships between ILECs and electric utilities).
[96] *2018 Third Report and Order*, ¶ 129.
[97] Complaint, ¶ 32.
[98] AT&T cites the *Verizon Virginia* decision as supporting the application of a breach of contract statute of limitations, but this is not what *Verizon Virginia* says. *See* Complaint, ¶ 32 n.88. Importantly, the Commission made no finding regarding the "applicable statute of limitations" in that case. The Commission merely noted that Verizon contended that the applicable statute of limitations was a 5-year breach of contract limitations period. *See Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, 32 FCC Rcd 3750, 3764 (2017).

appropriate statute of limitations, if this concept has any relevance at all to this proceeding, would be the two-year statute of limitations in 47 U.S.C. § 415.[99]

K. The Takings Clause Prohibits Applying Retroactive Rate Adjustments to the JUA or Attachments Made Thereunder.

The Fifth Amendment to the Constitution prohibits the taking of property without "just compensation" to the owner.[100] However, the relief that AT&T's Complaint seeks would do just that. As noted in FPL's Brief, Section V.B.4, the parties' 1975 JUA allows AT&T to avoid the cost of building its own pole network by accessing FPL's facilities. The parties' 1975 JUA requires FPL both to build pole infrastructure with enough strength and capacity to accommodate AT&T's attachments and to allow AT&T access to FPL's pole infrastructure. However, if not for the parties' 1975 JUA, FPL would do neither and would be required to do neither. AT&T would then have had to choose among the options of building its own pole line, undergrounding its own facilities or establishing a wireless network on non-FPL facilities.

The portion of its investment in its electric distribution network that would be taken from FPL is just like any other piece of tangible property and has all the characteristics and rights of more familiar property, including land.[101] The Supreme Court has consistently defined the term "just compensation" as the "full monetary equivalent of the property taken."[102] In turn, the full

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[99] *See e.g., American Cellular Corporation and Dobson Cellular Systems, Inc. v. BellSouth Telecommunications, Inc.*, 22 FCC Rcd 1083, 1083 (2007) (dismissing complaint filed under Section 208 for alleged over-billing as time barred under Section 415's two-year statute of limitations); *Michael J. Valenti and Real Estate Market Place of New Jersey t/a Real Estate Alternative v. American Telephone and Telegraph Company and MCI Telecommunications Corporation*, 12 FCC Rcd 2611, 2623 (1997) (denying applications for review and finding the Common Carrier Bureau properly dismissed complaints filed pursuant to Section 208 as time-barred by Section 415's two-year statute of limitations); *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. ALASCOM, Inc.*, 4 FCC Rcd 2472, 2477 (1989) (dismissing claims filed pursuant to Section 208 as time-barred under Section 415's two-year statute of limitations).

[100] U.S. Const., 5th Amend.

[101] *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (stating that "property" under the Takings Clause is "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

[102] *See e.g., United States v. Reynolds*, 397 U.S. 14, 16 (1970).

monetary equivalent is generally determined by the "market value" of the property on the date it is appropriated.[103] The Supreme Court typically has defined "market value" by employing a hypothetical "willing buyer/willing seller" standard.[104]

FPL only installed taller poles for AT&T with the reasonable expectation under then-existing rules that the pole costs would be recouped through joint use revenues as negotiated between the two parties.[105] Imposing either the Old Telecom rate or the New Rate as a "hard cap" on what FPL can recover from AT&T would deprive FPL of full recompense for the investments that FPL made solely for AT&T's benefit. The Commission's calculation of its regulated rates presumes either pre-existing capacity or additional compensation will be provided to the utility for the expansion of capacity through make ready and other charges. The Commission's regulated rates also presume a statutory right to access FPL's poles which AT&T does not possess. Thus, applying such a rate to the instant situation would effectively strip FPL of any means to recover the costs it has already incurred to meet AT&T's needs and would fall well short of providing FPL with "just compensation.

L. Any Potential Refunds Should Only Begin to Accrue Upon or After the Date of any Finding by the Commission that the 1975 JUA Rate is Not Just and Reasonable.

AT&T requests relief in the form of a refund ordered by the Commission for overpayments for the previous five years.[106] However, even if AT&T were entitled to any relief at all, it is unclear how that relief might be measured. In the *2011 Pole Attachment Order*, the Commission stated: "We also adopt the proposed modification of the Commission's rules §

[103] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001).
[104] *See Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984).
[105] Kennedy Dec., ¶ 7.A. Thus, because FPL's poles would have always been at full capacity absent the parties' JUA, AT&T stands in the position of the buyer "waiting in the wings" hypothesized by the 11th Circuit Court of Appeals when examining unconstitutional takings in the pole attachment context. *See Alabama Power Co. v. FCC Southern Company v. FCC*, 311 F.3d 1357 (11th Cir. 2002).
[106] Compl., ¶ 32.

1.1410(c), which permits a monetary award in the form of a 'refund or payment,' measured 'from the date that the complaint, as acceptable, was filed, plus interest.' We believe that this modification, which will allow monetary recovery in a pole attachment action to extend back as far as the applicable statute of limitations, will make injured attachers whole, and will be consistent with the way that claims for monetary recovery are generally treated under the law."[107] However, as noted above, the Commission has not articulated which statute of limitations would apply under the rule.[108] AT&T has not identified a legally applicable statute of limitations.[109]

Given AT&T's absolute failure to provide FPL with notice of the claims that make up this proceeding, failure to meet its financial obligations under the 1975 JUA for two years prior to filing its Complaint, and failure to comply in good faith with the Commission pre-complaint negotiation requirements, the Commission should declare that AT&T has engaged in laches and that any applicable statute of limitations has expired.[110] The Commission should not create a statute of limitations and reward AT&T's pre-complaint strategic behavior. Instead, any

[107] *2011 Pole Attachment Order*, ¶ 110.
[108] *See also American Elec. Power v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).
[109] FPL is well aware of the holding in *American Elec. Power v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013), that, "[u]nder this broad authorization, it is hard to see any legal objection to the Commission's selection of any ***reasonable period*** for accrual of compensation for overcharges or other violations of the statute or rules." This holding was focused more on the abstract question of whether the Commission had met the requirements of *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) that are applicable when the agency reverses course in a rulemaking. The *AEP* ruling did not address any particular accrual period or any as-applied facts, such as the instant case. The ruling did not even expressly address the issue of retroactivity. Therefore, the *AEP* holding should not be interpreted to countenance retroactivity under the circumstances of the instant proceeding. Any other conclusion would be inconsistent with *Bowen.*
[110] *Bethea v. Langford*, 45 So. 2d 496, 498 (Fla. 1949) (The doctrine of laches is an unreasonable delay in enforcing right, coupled with disadvantage to person against whom right is asserted). *See also Geter v. Simmons*, 49 So. 131, 133 (Fla. 1909) ("No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred" (internal citations omitted)); *Smith v. Daffin*, 155 So. 658, 660 (Fla. 1934) (where conscience, good faith, and reasonable diligence on part of person seeking aid of court of equity is lacking, court will not grant complainant relief prayed for, even though he might have been entitled to relief if he had acted with reasonable diligence).

potential remedy the Commission considers fashioning should begin only upon an order from the Commission finding a rate or term under the Agreement to be unjust or unreasonable.

M. The Case Should Be Dismissed as Moot.

Because the parties' 1975 JUA is currently terminated and the parties are engaged in ongoing litigation to effectuate the removal of AT&T's attachments from FPL's infrastructure, it is unclear what, if any, relief can actually be provided to AT&T. The plain language of the *2018 Third Report and Order* unquestionably forecloses the application of its new presumptions or the New Telecom Rate as a "hard cap" on the compensation owed under the parties' 1975 JUA.[111] Moreover, even if the Commission substitutes the Preexisting Telecom Rate for the Adjustment Rate currently found in the parties' agreement, FPL has demonstrated that it would be the party owed compensation rather than AT&T in that situation.[112] Thus, as there is no ongoing contractual relationship between the parties, there is nothing left for the Commission to adjudicate and AT&T's Complaint should be dismissed.

INFORMATION DESIGNATION PURSUANT TO RULE 1.726(F)

1. **The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the Complaint, answer, or exhibits thereto, and individuals employed by another party.**

The FPL employees and outside experts with relevant information about this proceeding and rental rate dispute are identified in this answer and its supporting declarations, affidavits, and exhibits.

[111] *2018 Third Report and Order*, n. 478 (internal citation omitted).
[112] Deaton Dec., ¶ 8.

2. **A copy - or a description by category and location - of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the Complaint or answer.**

The 1975 JUA and any relevant correspondence between the parties were attached as exhibits to the Complaint. Attached to FPL's Brief in Support of its Answer and FPL's Answer are declarations of FPL employees and third-party experts, and all relevant supporting documentation. Additional information and documents were filed and served on August 21, 2019, in connection with FPL's Response to AT&T's First Set of Interrogatories. Additionally, FPL is seeking information from AT&T via interrogatories that are being served concurrently with this answer. FPL reserves the right to rely on and submit information that is not included or attached to this answer if it is provided by AT&T or becomes relevant.

Respectfully submitted,

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Exhibit A

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T Florida,	)	
	)	Proceeding No. 19-187
Complainant,	)	
	)	Bureau ID No. EB-19-MD-006
v.	)	
	)	
FLORIDA POWER & LIGHT COMPANY,	)	
	)	
Respondent.	)	

DECLARATION OF THOMAS J. KENNEDY ON BEHALF OF DEFENDANT FLORIDA POWER AND LIGHT COMPANY

I, THOMAS J. KENNEDY, having personal knowledge of the facts contained herein, state as follows:

1. My name is Thomas J. Kennedy, and my business address is Florida Power & Light Company ("FPL" or the "Company"), 700 Universe Boulevard, Juno Beach, Florida 33408.

2. I am over the age of eighteen and am otherwise competent to testify.

3. I am employed by FPL as Principal Regulatory Analyst in the Power Delivery business unit, responsible for managing FPL's joint use agreements, including the joint use agreement with BellSouth Telecommunications, d/b/a AT&T Florida ("AT&T").

4. I graduated from the University of Florida in 1983 with a Bachelor of Science in Mechanical Engineering and I am a Professional Engineer licensed in the State of Florida. I have been employed by FPL since 1985. Prior to my current role at FPL, I held positions at FPL including distribution planner, distribution analyst, transmission and distribution crew supervisor and distribution design engineer.

5. Since 1994, my responsibilities have included: negotiating joint use and telecommunication pole attachment agreements for FPL; assisting with the establishment of pole attachment policies and associated processes for field personnel; providing agreement language interpretations; resolving field disputes; assisting with the oversight of pole attachment rate calculations; tracking and billing incumbent local exchange carriers ("ILECs") and telecommunication carrier attachments; complying with Federal Communication Commission ("FCC") and Florida Public Service Commission ("FPSC")

requirements, as well as legal and contractual obligations; budgeting and forecasting of FPL's pole attachment revenues and expenses; and ensuring that pole attachment related financial transactions are appropriately recorded.

6. The purpose of my declaration is to: (1) explain the material advantages the FPL/AT&T January 1, 1975 Joint Use Agreement ("JUA") provides AT&T compared to its purported competitors; (2) provide factual pole and attachment data for the FCC to use as inputs to the evaluation of its own rate formula; (3) provide the FCC with a record of the relationship between FPL and AT&T; and (4) provide facts relevant to FPL's response to the AT&T Amended Pole Attachment Complaint ("Complaint").

I. Material Advantages AT&T Receives Under the JUA

7. **A. Avoidance of Market Rates for Attachments.** But for the JUA, FPL is not and never has been obligated to build pole infrastructure tall enough to accommodate more facilities than what is required to serve its electric customers. In addition, FPL is not required to provide AT&T access voluntarily to its pole infrastructure, nor is FPL required to expand capacity to accommodate AT&T's attachments or any other entity's attachments.[1] Without the JUA, FPL would not have been required to build the extra space (i.e., used a taller or stronger pole) for AT&T's use. Therefore, without the JUA, AT&T would have been charged make-ready costs for replacement poles[2] and FPL could have charged AT&T market rates for attaching to FPL's poles. Moreover, if there was no JUA, AT&T would be subject to market rates for its attachments because there would have been no space on the utility pole for a second or third party.[3] The utility pole would have been at full capacity and AT&T would have been a requester of space 'waiting in the wings".

B. Monetary value. Because AT&T would have had (and still does) other available options to choose from besides using FPL poles to meet its service obligations (e.g., building its own pole line, undergrounding its facilities, or wireless to home offer), the market rate would have to be a value less than AT&T's other options before AT&T would choose to attach to FPL poles. The best information FPL has regarding a market rate that an attacher with no mandatory access rights and no regulated rate would pay is what AT&T has been paying for access to FPL transmission structures since 1995, or in other words what other attachers are paying to attach wireline cable to FPL transmission poles.

	2014	2015	2016	2017	2018
Transmission Rates	[redacted]				

Other attachers with no mandatory access pay FPL a negotiated market rate shown below to use FPL's poles. The differences in the market rate for an attachment that occupies one foot of space without any associated joint use terms and conditions compared to the AT&T joint use rate which provides for four feet of space and other advantages are as follows:

[1] Southern Co. v. FCC, 293 F.3d 1338 (11th Cir., June 13, 2002)

[2] The make ready costs to replace a pole can run anywhere from [redacted] per pole.

[3] Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir. 2002).

	2014	2015	2016	2017	2018
Market Rate 1'		[redacted]			
Joint Use Rate 4'					
Value to AT&T					

8. **Pole Ownership Means Bargaining Power.** AT&T's bargaining position with FPL, as informed in part by pole ownership ratios, has essentially remained strong since 1975, the year the JUA at issue was negotiated (see Exhibit A). For 28 years (1975-2003), AT&T's ownership ratio was 40% or more. From 2004-2018, AT&T's ownership ratio has slowly declined – from 39% to 34%, primarily due to FPL's FPSC-ordered storm hardening initiatives, which were required to be implemented after the devastating 2004 and 2005 hurricane seasons. For example, since 2006, FPL has installed over 20,000 mid- span poles and replaced over 5,000 AT&T wood poles with concrete poles (AT&T does not install concrete poles), both of which have affected pole ownership ratios. This relatively static pole ownership ratio has allowed AT&T to maintain a strong impact on bargaining position with FPL while also retaining the competitive advantages the JUA grants AT&T over other telecom providers[4]. Additionally, its bargaining position in 1975 allowed AT&T to negotiate a better objective percentage ownership than the other ILECs in FPL's territory, i.e., 47.4% for AT&T vs. 50% for the other ILECs.

   See Exhibit B, Letter from AT&T's negotiating representative announcing to AT&T's operational employees its success in negotiating the joint use agreement with FPL, which stated as follows.

   > *The principle of space usage recognition* ***has been accepted by FP&L****. The rental rate is based on percentage ownership reflecting space allocations of 47.4% for the Telephone Company and 52.6% for the Power Company, rather than the old reciprocal rate.* [emphasis added].

   Not only does this demonstrate that the ratio is what AT&T was seeking, but that AT&T had negotiating power. It should be noted that AT&T has never since requested to renegotiate the joint use agreement (nor the rate formula contained within the JUA). Additionally, FPL has sought several times to purchase all of AT&T's poles (with FPL attached) while being open to a renegotiation that would place AT&T in the same or similar position as other telecom providers. These discussions were not productive, as AT&T appeared uninterested in selling its poles to FPL.

   The benefits associated with AT&T's bargaining power cannot be quantified comprehensively, but one quantifiable element is the savings associated with the ownership percentage negotiated by AT&T. AT&T is the only ILEC attached to FPL poles that was able to negotiate a 47.4% / 52.6% ratio of pole cost responsibility. That resulted in nearly [redacted] of savings from 2014 - 2018 (see below) for AT&T that their ILEC cohorts were unable to achieve.

[4] Telecom provider(s) as referred throughout this declaration refers to both telecommunication service providers (sometimes referred to as CLECs) and CATV companies, unless specified otherwise.

	2014	2015	2016	2017	2018	Total
AT&T attached to FPL Wood	[redacted]					
FPL attached to AT&T Wood						
Total AT&T savings						

9. **Guaranteed Access.** AT&T was granted guaranteed access rights under the JUA, until AT&T's actions of non-payment for well over a year necessitated that FPL terminate AT&T's right to attach to FPL's poles.[5] . FPL is not required to provide AT&T access voluntarily to its pole infrastructure. The JUA requires FPL to design and construct its utility pole network in the overlapping AT&T service territory with poles tall and strong enough to accommodate four feet of space for AT&T, which was available to AT&T for the present as well as the future. No other telecom provider is granted this windfall. In this regard, the JUA states as follows:

> *"Section 4.2 Whenever either party hereto is about to erect new poles within the territory covered by this Agreement, either as a new pole line, an extension of an existing pole line, or as the reconstruction of an existing pole line being jointly used hereunder, such party shall immediately notify the other party hereto prior to completion of engineering plans for such erection in order that any necessary joint planning may be coordinated and so that compliance may be had with the provisions of Section 4.3 and 4.4 of this Article IV."*

What this equates to is, at FPL's cost, FPL is required to set joint use poles that are 10 feet taller than it needs to serve its electric customers (i.e., 4 feet for AT&T + 3'4" for communication space and an additional 1 foot of pole burial space. The 8'4" additional space translates to 10 feet as poles are procured in 5 foot increments.

The additional cost[6] of installing a ten foot taller typical wood joint use pole is [redacted] or 41% more than the cost of a pole FPL needs to solely serve its electric customers. This excludes consideration of the cost of thousands of concrete poles FPL has set to accommodate AT&T as a result of its more stringent wind load requirements associated with FPL's FPSC-approved hardening construction standards. Florida is a fast-growing state and AT&T is installing approximately 3,000 new attachments per year, which means FPL is spending more than [redacted] per year to accommodate AT&T and the

[5] On March 25, 2019, FPL exercised its rights under the 1975 JUA to both (a) terminate AT&T's pole attachment rights as to its existing attachments for non-payment; and (b) terminate the 1975 JUA as it applies to any future obligation of either party as to additional poles, effective August 25, 2019. As of March 25, 2019, FPL's [redacted] invoice to AT&T for the 2017 calendar year was 355 days past due. Also, FPL's [redacted] invoice to AT&T for the 2018 calendar year was 22 days past due.

[6] Exhibit C

communication worker safety space. That means FPL has spent over [redacted] (in todays' dollars) to accommodate AT&T's attachments ([redacted]). Without proper compensation, FPL will have to reevaluate the benefits of all joint use agreements, and, in particular, whether it should continue to design and invest in a network of poles that are more expensive than it needs for its own purposes. Of course, if FPL were to install poles 10' shorter, it would not only impact AT&T but the entire communication/CATV industry, as well as broadband deployment, as communication space currently available on joint use poles would disappear.

10. **Capacity Expansion and Make-Ready Avoidance for First Time Attachments.** By having poles built to accommodate AT&T's attachments, AT&T has a distinct advantage over other telecom providers. While in many instances AT&T's alleged rivals can use[8] any available space on an existing joint use pole, not all poles are built for joint use and not all joint use poles have available space for an additional attachment.

Capacity Expansion – There are instances where an FPL pole has reached capacity on pole height or strength or where FPL will not expand capacity for other telecom providers. FPL is, of course, not legally required to expand capacity. Other telecom providers are required to find an alternative, such as choosing a different pole line route requiring additional cable, equipment and more pole attachment fees or undergrounding their facilities. For AT&T, however, FPL contractually expands capacity.

Make-Ready Avoidance – AT&T avoids make-ready under the JUA by having a pole line built to suit - without contribution. If FPL built a pole line for only its own needs, not only would it save FPL [redacted] per each pole installed, but it would cost AT&T approximately [redacted] to replace the existing wood pole with a wood pole that could accommodate communication space as well as a communication worker safety space. If the wind loading required a concrete pole or was inaccessible, that cost could increase to as much as [redacted] per pole or more. With AT&T attaching to 3,000 new poles per year, that would be a major increase to its new construction expense and also would place its time-to market in line with other telecom providers.

The make ready per pole cost other telecom providers have paid to attach to FPL joint use poles presents a reasonable estimate of the make ready per pole cost AT&T avoids. The make ready costs displayed below include cable and conductor rearrangement as well as pole change-outs. Many telecom providers will look for other alternatives (e.g. underground their facilities) if they have to pay to change out a pole. Other providers, even

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[7] 420,914 is the forecasted attachments used for billing at the end of 2018. Section 10.9 of the JUA requires that "each party, acting in cooperation with the other, shall have ascertained and tabulated the total number of poles in use, or specifically reserved for use, by each party as Licensee." Since the 1980's FPL and AT&T have shared a forecasting model that predicts the number of attachments made by each party using the joint use surveys as a base and calculates new attachments predicted by the model using a historical escalation. Any error in the forecast is trued up through future billing in accordance with Section 10.10 of the JUA. The number provided in the Robert Murphy declaration was based on the actual number of attachments at the time the survey went through that area.

[8] FCC 96-325, at 1170.

[9] Exhibit D.

with the benefit of having a communication space and communication worker safety space already in place, have paid the following to access FPL poles.

	2014	2015	2016	2017	2018
Make-Ready cost paid by other telecom providers		[redacted]			
Poles					
Cost per pole					

11. **Guaranteed Free Make-Ready for Mature Joint Use Poles already having AT&T Attachments.** Under FCC order[10], FPL is not permitted to reserve four feet of space on each FPL pole for AT&T's use. Therefore, after AT&T has already made its first attachment, FPL cannot deny access to attachers requesting to attach in the remaining amount of AT&T's reserved space. To be compliant with the JUA, FPL is required to make that remaining space available on mature poles if AT&T were to need it in the future.

> *Section 14.5 Third party space requirements must be accommodated without permanent encroachment into the standard space allocation of the Licensee; therefore, neither party hereto shall, as Owner, lease to any third party, space on a joint use pole within the allotted standard space of the Licensee without adequate provision for subsequent use of such standard space by Licensee without cost to the Licensee.*[11]

Since the FCC rules do not allow FPL to lease the space temporarily (subject to be returned to AT&T)[12], FPL would be contractually required to expand capacity at FPL's customers' expense if AT&T should need that four feet of space as long as that pole remains a joint use pole.

Over the next 10 years, each wireless provider is expected to install 500-1,000 5G nodes in FPL's service territory. It is foreseeable that AT&T could be installing 10,000 or more 5G nodes in FPL's service territory.[13] Considering AT&T owns approximately one third of the AT&T/FPL joint use pole infrastructure in FPL's service territory, AT&T could require approximately 7,000 additional node locations from FPL. If AT&T should decide

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[10] FCC 96-325, at 1170.

[11] Joint Use Agreement between FPL & AT&T.

[12] FCC 96-325, at 1170.

[13] Article describing AT&T installing 10,000 5G nodes in Dallas, TX, https://www.dmagazine.com/frontburner/2019/01/the-city-has-to-decide-where-to-hide-10000-5g-nodes/

to reclaim that 4' of space to place those nodes on FPL joint use poles, FPL's customers would be required to pay for the capacity expansion.[14]

> *Section 14.4 Each Owner reserves the right to use, or permit to be used by other third parties, such attachments on poles owned by it which would not interfere with the rights of the Licensee with respect to use of such poles.*[15]

Such an arrangement[16] provides AT&T with unprecedented advantage over other telecom providers. The JUA guarantees AT&T access to the node locations, or for any other capacity expansion requirements that it needs at no cost to AT&T. Other telecom providers would not only be required to pay for capacity expansion at each location, they are not guaranteed FPL will grant capacity expansion. Additionally, AT&T could also reclaim that four feet of space, at FPL's expense, to place nodes to lease to other 5G providers at market rates (or lease to their affiliate). Alternatively, instead of paying for make-ready on 3,000 of their own poles, AT&T could force FPL to expand capacity on all 10,000 of FPL's poles.

Value of guaranteed access – Access for node locations can be quite expensive and can include permitting, right-of-way acquisition, market rates, infrastructure construction, individual negotiation for each node location. While I am unaware of what 5G carriers budget/pay for access, at a minimum, it would include the cost of a monopole and right-of-way permitting. At a cost of [redacted] per monopole, AT&T would be saving a minimum of [redacted] for 7,000 node locations. However, the actual value is much higher, particularly if AT&T must negotiate each location individually.

Value of free make-ready – If FPL pays for the make-ready at 7,000 node locations to accommodate AT&T's guaranteed expansion of capacity, AT&T avoids make-ready that other carriers are required to pay, should they be granted access. Other cell providers would be required to pay [redacted] times 10,000 node locations or [redacted] each.

12. **Time-Value of money.** AT&T pays its joint use fee annually in arrears (in March of the year following), while other telecom providers pay pole attachment fees semi-annually in advance (in June and December of the billing year). Using a discount rate that is identified and approved by the FCC[18], AT&T gets the advantage identified below. It should be noted that since AT&T did not pay their invoice for 2017 and 2018 until July 1, 2019, as noted in the declaration of David T. Bromley, the financial advantage AT&T had over other telecom providers is actually much higher than displayed in the table below for those years.

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[14] This assumes that FPL is unsuccessful in the enforcement of the termination provision of the JUA which was exercised by FPL on March 25, 2019.

[15] Joint Use Agreement between FPL & AT&T.

[16] Ibid.

[17] Exhibit D.

[18] See FCC 16-33 and 2016 FCC Matter of Connect America Fund, ETC Annual Reports and Certifications, and Developing a Unified Intercarrier Compensation Regime - para 10. Also, these discount rates are set forth in the chart found at paragraph 31 which AT&T uses as its rate of return.

Payments	Payment Terms of Other Telecom Providers	AT&T Advantage with Full Payment in Arrears
First Payment	5 Months Advance Payment	[redacted]
Second Payment	6 Months Advance Payment	
Third Payment	1 Months Advance Payment	

Formula used to Calculate AT&T's Time Value of Money Advantage :
(5/12 X Amount Due[19] X Discount Rate[20] X 15 months) + (6/12 X Amount Due X Discount Rate X 9 months) + (1/12 X Amount Due X Discount Rate X 3 months)

	2014	2015	2016	2017	2018
Savings	[redacted]				
Poles					
AT&T Advantage per pole					

13. **Space Used.** The JUA provides AT&T the lowest spot on joint use poles as well as four feet of the lowest communication space on the pole. This allows AT&T to work in a safer area of the pole, access poles more easily and avoid maintaining a fleet of expensive bucket trucks with a greater reach. Also, AT&T is almost always the first to attach to a new joint use pole. Typically, AT&T does not attach at the lowest possible point on the new joint use pole (perhaps because AT&T has four feet of space). When FPL receives a request to attach from an AT&T alleged competitor and the only available space on the pole is below the AT&T attachment (this is quite common), FPL must forward the attachment request to AT&T to have it either grant permission for their alleged competitor to attach below AT&T's attachment (assuming no code violations) or the attacher pays to have AT&T relocate lower on the pole in order to make space for the alleged competitor's attachment. Keep in mind the JUA requires AT&T to be in the lowest position. AT&T's alleged competitors have expressed a concern that AT&T is not responsive to their requests. These delays provide AT&T a value of time to market. While the FCC's new one touch make-ready process[21] provides AT&T's alleged competitors some potential relief from these delays, other telecom providers are still required to pay additional construction fees by moving AT&T to gain access.

14. **A Lifetime of Free Make-ready.** The JUA obligates the pole owner to operate and maintain the joint use pole for the life of the joint use attachment unless the pole owner abandons the pole. FPL's wood joint use poles have an average life of 44 years. That means when the FPL pole reaches end of life or when FPL is forced to relocate a joint use pole

[19] Amount Due is the amount AT&T owed for its attachments to FPL's poles using the joint use rate.
[20] Discount rate used is that shown in paragraph 31.
[21] FCC 18-111

(e.g., the Department of Transportation forces relocation of the pole for roadwork), FPL is responsible for replacing/relocating the pole without contribution from AT&T. In accordance with the JUA, the new replacement FPL pole must be built to accommodate AT&T's joint use attachments. AT&T's alleged competitors do not have this same advantage. They agree to reimburse FPL for the additional cost associated with accommodating their facilities in connection with a pole replacement that is not caused or requested by another party. While AT&T's alleged competitors on the same pole as AT&T may benefit from the free replacement associated with the JUA if AT&T is also attached to the pole, they are required to reimburse FPL for the additional cost not required for FPL's needs if it is not a joint use pole. In today's cost, that amounts to AT&T saving [redacted] per pole that other telecom providers are responsible for on non-joint use poles. While AT&T is currently attached to approximately 421,000 FPL joint use poles, there are approximately 400,000 poles that are non-joint-use poles, i.e., no ILEC attached. FPL must replace about 3,000 poles each year because they have reached the end of their useful life. AT&T is on about 1,000 of those poles receiving free make-ready. This saves AT&T about [redacted] each year in avoided make-ready.

15. **Permitting Requirement.** Since FPL/AT&T joint use pole lines are designed to accommodate AT&T, AT&T is not required to obtain advance approval through permits to make attachments to FPL poles. In contrast, telecom carriers must follow FPL's attachment permit application process, in which they are charged a fee to compensate FPL or FPL's permit vendor for the permit review effort. This process, of course, requires money and takes time – both of which AT&T avoids. Permit costs paid by other telecom providers are [redacted] with no make-ready and [redacted] with make-ready. Additionally, any alleged competitors are subjected to a post-attachment inspection by FPL or its designated contractor of each attachment to ensure compliance with the permit application and are responsible for the costs associated with that inspection. Again, AT&T avoids the follow-up inspection time/costs as a result of the JUA, which does not require AT&T to do a post-attachment inspection (nor am I aware of AT&T doing such inspections beyond their normal inspection of their work, which is no different than other attachers do).

    Given that AT&T makes approximately 3,000 new attachments annually under the JUA, it saves about [redacted] in annual permit and post-attachment inspection costs (assuming AT&T would require make-ready on all new attachments without a joint use agreement).

16. **Ease of Access.** FPL pole lines built to accommodate AT&T under the JUA require no survey or engineering of clearance or structural impact from AT&T because FPL incorporates these items into the installation design. Other telecom providers must use the attachment permit application measurement worksheet to confirm that adequate clearances exist for the installation of their attachments. In addition, the measurement worksheet is used to prepare and submit a strength study for wind-loading, to ensure compliance with FPL's construction standards which are submitted to and approved by the FPSC and specified in FPL's Permit Application Process Manual. Telecom carriers must complete and pay for the following:

    a. Review FPL's 209-page permit manual:

b. Obtain appropriate FPL maps and prepare licensee maps for submission;
c. Gather all required field notes, GPS addresses and photos (Note: Field notes must precede permit submittal by no more than four months.);
d. Perform wind loading calculations;
e. Evaluate "Non-Make Ready"/" Make Ready" decisions;
f. Assemble permit package(s);
g. Submit permit package(s) (Note: Field notes must precede permit submittal by no more than four months.);
h. Determine if FPL Make Ready is required;
i. Notify vendor to prepare work order design;
j. Await FPL permitting (City, County, FDOT);
k. Await FPL make-ready construction;
l. Request make-ready from other attachers;
m. Await other attachers make-ready construction or do one-touch make-ready (Note: one-touch make-ready was not required during the billing periods in question in this proceeding);
n. Receive approval to attach to FPL poles;
o. Construct attachments (with signed copy of permit in field);
p. Obtain approval of post-attachment reviews (could involve satisfying post-inspection failures);
q. Complete/submit Exhibit "B" – Notification of Attachment/Removal; and,
r. Submit appropriate drop pole and mid-span pole packages.;

The application package includes:
a. Payment for processing fee;
b. Prepare permit application, Exhibit "A", request to attach;
c. Complete location identifiers with GPS address(es);
d. Pole & Mid-span Measurement Worksheet at each pole;
e. Wind load calculations for each pole;
f. Photos at each pole location;
g. Computer-generated licensee maps with route highlighted, affected pole(s) numbered in sequence, and with span footages shown (sized 8.5" x 11 to 11" x 17");
h. Marked up highlighted route on 11" x 17" FPL maps;
i. Current permit number, assigned by attacher; and,
j. Estimated date for completing field work, which must be completed within four months to avoid conflict with other attachers;

The permit application task requires several hours of preparation time per pole, field work (including travel), office design work, and permit preparation work. One contractor charges telecom providers [redacted] per newly installed pole in preparing an application, inclusive of time and the cost of supplies. Given that AT&T makes approximately 3,000 new attachments annually, under the JUA, AT&T saves [redacted] in annual permit preparation costs.

It could take an attacher one or two months of preparation time before they even get an

application to FPL's permit application vendor. From this point it could take another 45 days for the permit to be reviewed for approval or denial. An attacher may have invested all this and after two months receive a denial, approval or request to change permit types if the attacher made a mistake, e.g. non-make-ready to make-ready. If make-ready is required, this could add another 90 to 115 days to prepare the pole per attaching entity that has to move. If both AT&T and other telecom providers are after the same customers at the same time, certainly, the JUA provides an advantage for AT&T. While it is difficult to quantify this advantage, clearly, for AT&T it would include additional customers and increased revenues/income.

17. **Access to Rights-of-way and Easements Obtained by FPL.** The JUA requires the pole owner to obtain rights-of-way for the joint user, to the extent that they are able to obtain those rights (another benefit of access negotiated by AT&T and granted under the JUA – see paragraph 9). AT&T has benefitted from FPL obtaining those rights-of-way for AT&T. In many cases, AT&T has been able to attach to FPL poles without notice to or permission from the land owner. In some instances, FPL has obtained easements that include easement rights for all carriers providing telecommunications services. However, private easements obtained by FPL do not provide easement rights for CATV companies. Several types of costs are incurred when obtaining private easements and public right of way. FPL estimates about 20% to 30% of FPL's facilities lie within easements obtained by FPL. Without the JUA, AT&T would not benefit from the new easements on about 20% to 30% of the 3,000 new poles AT&T attaches to per year.

Estimated Private Easement Costs

Cost of the Land. – Obtaining an easement can cost about 60% of the property value. 60% X 1/20[22] of the property X [redacted] (average property value) = [redacted] property X 1 pole per property X 3,000 poles annually X 25% = [redacted] Annually.

Cost of the Negotiator. – It would take a negotiator about two days per easement to prepare and undergo an easement negotiation. 2days / 240 work days/yr X [redacted] per employee/yr. X 25% X 3,000 poles = [redacted] Annually

Cost of the Administration. – An administrator would be required to prepare the documents, make copies, file with the appropriate agency and file within company archives. 20% A&G Adder = [redacted] Annually

Cost of Recording. – Typical fees to record an easement are [redacted] X 25% X 3,000 poles = [redacted] Annually

By FPL obtaining rights to allow AT&T to use FPL's easements, AT&T saves approximately [redacted] annually. While some telecom carriers may also benefit from some of these easements due to the easement language, CATV companies do not benefit from the easements. Additionally, many telecom carriers have no idea these easements

[22] A conservative estimate of the amount of a typical property used for an electric distribution easement is 1/20th of the property, based on a ten foot strip in the front or rear.

exist and place their facilities only in public rights of way. Without these easements AT&T would have to either obtain their own easements at [redacted] annually or build their own facilities in public rights of way.

Estimated Public Rights of Way Costs

The remaining poles are placed in governmental agency rights-of-way or utility easements where an agency may charge up to [redacted] per pole in permit fees. Most agencies do not charge a permit fee for aerial attachments. Undergrounding cable would cost up to [redacted] foot.

Cost of Obtaining permits = [redacted] / pole X 3,000 poles annually X 75% = [redacted] year

Cost of the Administration. – An administrator would be required to prepare the documents, make copies, file with the appropriate agency and file within company archives about a half of a day per permit = ½ day / 240 work days/yr X [redacted] X 75% X 3,000 poles / 10 poles /permit = [redacted] Annually

By obtaining rights to attach to FPL poles in agency rights of way, AT&T saves approximately [redacted] annually in permit fees. Without the JUA, AT&T would have to either obtain their own permits and build their own facilities. Placing their facilities underground would be substantially more expensive.

Other JUA Advantages

The following items benefit AT&T over telecom and CATV carriers, although it is difficult to attribute a specific dollar value:

18. **No Unauthorized Attachments.** The JUA provides AT&T with unfettered access to FPL's poles, thereby essentially eliminating the potential for an unauthorized attachment. To my knowledge, AT&T has never been charged an unauthorized attachment fee. When other attachers do not follow the application process, they are subject to unauthorized attachment fees of [redacted] per pole.

19. **Direct vs. Indirect Make-Ready Fees.** Where the JUA provides for the exchange of payment for make-ready as described in Article IV, e.g. a taller and/or stronger than a normal joint use pole is required, AT&T is only charged direct construction costs plus overheads that are required for the work. Other attachers pay an allocation of all applicable overheads for make-ready work, including, for example, administrative and general expenses.

20. **Flexibility.** The JUA provides AT&T four feet of space on a joint use pole in which to make its attachments. Standard practice and code compliance also provides AT&T the right to the preferred spot on the pole – the lowest position – which ensures easy access and quick construction methods. However, as previously mentioned, AT&T rarely occupies the lowest possible attachment location which can present issues/delays for other telecom providers. Although AT&T claims that attaching at the lowest points on the pole is a

disadvantage, they have never asked FPL to attach anywhere else nor am I aware of any alleged incidents where AT&T has replaced joint use poles due to accidents caused by the properly placed position of their attachments.

21. **Expansion of Capacity.** The JUA requires FPL to change out a pole under several circumstances to accommodate AT&T. FPL is not required to and, in certain situations, has refused to change out a pole for other attachers.

22. **Transfer of Ownership.** The JUA provides AT&T the right to take ownership of an FPL-owned pole being abandoned by FPL. Other telecom providers are required to remove their facilities from a pole no longer used to provide electric service so FPL can remove the pole. Those telecom providers must find other means to bring service to their customer.

23. **Common Pole Bond.** FPL shares its common grounding pole-bond with AT&T as required by the JUA. This may also meet the requirements of other telecom providers; however, if additional bonding is required, the other telecom providers are required to reimburse FPL for the necessary bond work.

24. **Insurance.** Under the JUA, liability is allocated based on responsibility. Other telecom providers are required to indemnify FPL and carry insurance coverage listing FPL as an additional insured. Other telecom providers must meet a more stringent insurance requirement, which costs them more.

25. **Increase in Stronger/Concrete Poles.** In many cases, the addition of AT&T's attachments to an FPL pole adds significant load on the pole for design purposes. This is primarily driven by the increase in pole height and the girth of the AT&T cable. Per the JUA, FPL is required to accommodate an increase in capacity without a contribution in aid of construction. With FPL's FPSC approved construction standards, this additional load requires FPL to set stronger concrete poles at FPL's expense. The additional 1.5 attachment rate AT&T pays for special poles under the JUA pales in comparison to the additional [redacted] FPL incurs to install a new concrete pole.

26. **Bond and Removal Fees.** FPL requires AT&T's alleged competitors to purchase a bond (coverage from [redacted] per attachment) to cover the cost of removal of their facilities, if necessary. This bond must be revised annually to account for the change in the number of attachments. This is not required in AT&T's joint use agreement. Other telecom providers are being held to a more stringent requirement from a surety bond perspective and are required to purchase these bonds.

27. **Contribution from FPL to Build a New Relocated Pole Line.** When FPL builds a new transmission structure line over an existing distribution pole line owned by either company, AT&T, at its option, may relocate to a new pole line and require FPL to pay for one half the construction of an equivalent pole line to accommodate AT&T's facilities.[23] AT&T's alleged competitors have no such option. They may either stay on the new transmission

[23] Joint Use Agreement – Section 3.5

structure line and transfer their facilities to the new transmission poles or they can relocate their facilities at their own costs.

II. FCC Formula Inputs for Rate Calculations

28. **Data Collection.** FPL administers annual pole attachment surveys of joint use facilities (poles owned and attached to by FPL or telephone companies) and attachments (Power, ILEC, CATV and Telecommunication Carrier attachments) to both FPL and ILEC poles. All parties contribute to the cost of surveys and the data associated with the survey is owned by and available to all parties, including AT&T. Prior to each survey, all parties agree to the parameters and the surveyors and agree to participate in the post-survey field check. When the post-survey field check is complete, each party signs off to confirm that the survey results are accurate. FPL system-wide surveys are on a five-year cycle, i.e., each annual survey covers approximately 20% of FPL's service territory. Data collected in the survey includes the number and ownership of jointly-used poles, pole height, and the number and ownership of attachments by CATV and telecommunications carriers. Every five years all the joint use poles in FPL's service territory are surveyed. For joint use/attachment surveys, FPL has segregated its service territory into five regions. AT&T operates in four of the five regions.[24] See also FPL's response to AT&T Interrogatory #10.

The Most Current Joint Use Survey Results of FPL Distribution Poles with AT&T attached:

Number of Regulated Attaching Entities[25]	2.96
Average Pole Height	40.4'
Usable Space	15.9'
Unusable Space *	24.5'

* 40' wood poles require 6.5' of burial depth.

29. **Remaining Data to Complete the Variables for an FCC Rate Calculation.** In 2019, FPL conducted a sample survey of FPL joint use poles to obtain information not captured by the annual surveys, e.g., the number of attachments made by other non-regulated attaching entities (e.g. governmental agencies) and the amount of space occupied on an FPL pole by AT&T. A description of the sample survey is addressed in the declaration of Robert Murphy. The validity of this sample survey is addressed in the declaration submitted by FPL employee Ronald Davis. See also FPL's response to AT&T Interrogatory #10. The results of that survey were as follows: AT&T was found to occupy an average of 1.18 feet of space on FPL joint use poles with their cables and 1% (20 out of 1,956) of those poles had one non-regulated attaching entity. The joint use survey just began collecting non-regulated attachers in FPL service territory. Currently only half of

[24] Within these four FPL regions, FPL's joint use poles shared with AT&T are broken down into six individual survey territories. See Declaration of Robert Murphy with Alpine.

[25] Includes FPL and AT&T.

one survey region has actual results for attachments of governmental entities. That portion of survey region was central Florida area. FPL has chosen to use the number of governmental entities attached in central Florida (0.028) for our state-wide average of non-regulated attachments instead of the sample (0.01) to be conservative.

Sample Survey Results with Central Florida Actual Number of Governmental Attachments.

	FPL Distribution Poles with AT&T Attached
AT&T Cable Space Used	1.18
Number of Non-regulated Attaching Entities	0.028

30. **FCC Variables for Rate Calculation.** The following variables to the FCC rate formula were determined through the surveys described in paragraphs 28 and 29 above. Both surveys are described in detail within the affidavit provided by Rob Murphy. These variables apply to all the joint use distribution poles owned by FPL and attached to by AT&T. No other poles are included to determine these values. Combining the results of the sample survey (described in paragraph 29) regarding attaching entities and space used by AT&T with the results of the five-year rolling survey agreed upon between FPL and AT&T and approved as accurate by AT&T (described in paragraph 28) plus 40 inches of communication worker safety space (necessary to accommodate AT&T's request for joint use poles),[26] establishes an average number of attaching entities in AT&T's service territory of 2.99 and total AT&T space used of 4.51 feet.

FCC Variables

	FPL Distribution Poles with AT&T Attached
AT&T Total Space Used	4.5'
Total Number of Attaching Entities	2.99
Average Pole Height	40.4'
Usable Space	15.9'

[26] In order for AT&T to attach to FPL's distribution pole, FPL had to install a pole large enough to accommodate the additional 40" or 3.3' of communication worker safety space. Based upon the Survey, it was shown that AT&T was occupying 14.2" or 1.2' feet of space. 3.3' + 1.2' = 4.5' of space is required for AT&T's attachment on an FPL joint use pole.

Unusable Space *	24.5'

* 40' wood poles require 6.5' of burial depth.

31. **Rate of Return Discrepancy.** FPL does not have an approved rate of return by state regulators. When charging FCC regulated attachers, FPL uses a rate of return that is backward calculated from its state regulator approved return on equity. Since AT&T uses a higher FCC authorized rate of return to charge its attachers, FPL should be allowed to charge a reciprocal FCC approved rate of return, particularly when charging AT&T.

Rate of Return used to charge attachers

	2014	2015	2016	2017	2018
AT&T[27]	[redacted]				
FPL					

III. RECORD OF RELATIONSHIP AND POLE OWNERSHIP RATIO

32. **Joint Use Relationship.** AT&T's pole attachment relationship with FPL can be traced as far back as 1920, when then Southern Bell Telephone and Telegraph Company (now AT&T) entered into a joint use agreement for 13 poles with Daytona Public Service Company, a predecessor of FPL. FPL was formed in 1925 when American Power & Light Co. (APL), a utility holding company combined several utilities within the state of Florida, including Daytona Public Service Company. APL spun off FPL as an independent company in 1950.

Since that 1920 agreement, FPL and AT&T entered into at least five supplemental, addendum or completely new joint use agreements before entering into the current agreement, which was effective January 1st, 1975. In all agreements executed prior to January 1, 1975, a 50%-50% split in cost was acceptable to both companies.

In early 1961, the parties executed a mutually agreeable joint use agreement and billing under the agreement was retroactive to January 1, 1960. *See* Exhibit E, 1961 Joint Use Agreement. That joint use agreement expressed "desire" by both the electric company and the telephone company to execute an agreement in accordance with the "Principles and Practices for the Joint Use of Wood Poles by Supply and Communications Companies," which is contained in the 1945 document "Reports of Joint General Committee of Edison Electric Institute and Bell Telephone System on Physical Relations Between Electrical Supply and Communication Systems." *See* Exhibit F, EEI-Bell Report, authored by three members of American Telephone and Telegraph Company ("AT&T"). Therefore, AT&T's predecessors effectively assisted and co-authored the terms of the joint use agreement that AT&T signed in 1961. The EEI-Bell Report states, "In cases where it is not clear as to what

[27] Calculation basis can be found in the declaration of Renae Deaton

constitutes an equitable apportionment a fifty-fifty division of the costs may be found the most practicable solution." *Page 33.*

33. **Current JUA.** On January 1, 1975, AT&T and FPL entered into their current JUA. The terms and conditions of this agreement were based on the 1961 agreement. However, the adjustment rate was amended from "the annual fixed charges on the average unit in plant cost of all of the poles of both companies" to "the average annual cost of joint use poles for the next preceding year as determined by the party having more than its objective percentage ownership of jointly used poles" and the apportionment of the adjustment rate for joint use was amended to 47.4% for the Telephone Company and 52.6% for the Power Company; however, the option allowing the company owning a minority of poles to purchase poles was removed. While I have no records as to who removed that option, AT&T did extol on obtaining this provision:

> *The principle of space usage recognition* ***has been accepted by FP&L****. The rental rate is based on percentage ownership reflecting space allocations of 47.4% for the Telephone Company and 52.6% for the Power Company, rather than the old reciprocal rate.* [emphasis added], *See* Exhibit B, Letter from AT&T's negotiating representative

The letter goes on to say,

> *Since it is expected that the annual adjustment rate will increase in subsequent years, all of the areas should continue efforts to reach our objective percentage of pole ownership as early as practicable. This would reduce the effect of the higher rental rate.*

AT&T knew the impact of not investing in infrastructure in 1975, had the opportunity to normalize the pole ownership since 1961, yet chose to allow FPL to make the investment in the pole infrastructure, knowing the consequences of higher comparative rental rates due to the disparities of the parties' investment in pole infrastructure.

The current joint use attachments fall under the terms and conditions of this agreement. Since I have been at FPL, AT&T has not raised for discussion the topic of renegotiating the adjustment rate, or the pole ownership split.

The joint use agreements with FPL have given AT&T the right to set as many new joint use poles as they wish. These agreements did not force parity, but did encourage parity and in the earlier agreements gave AT&T the option to purchase poles. Though the joint use adjustment rate doesn't reflect the actual cost of owning a pole, it was just one of the means used to encourage pole ownership parity and AT&T was fully aware of this since at least 1975. Apparently, AT&T and its predecessors found that it was more cost effective to pay the 47.4% joint use adjustment rate than it was to actually own the stated objective ownership of poles.

This history shows that not only did AT&T employees author the document that the joint use agreements were based on, but they successfully negotiated an adjustment rate AT&T was satisfied with for joint use with FPL.

At no time has AT&T ever shown an interest in renegotiating the JUA, nor has it ever requested to renegotiate the rate formula contained in the JUA.

34. **AT&T's Superficial Interest in Owning New Poles.** In addition to the 1975 letter, see Exhibit B, AT&T made at least a couple more declarations that they wanted to own poles and that they wanted their field personnel to set more poles. In 1987, FPL and AT&T held joint meetings to establish additional guidelines for the joint use relationship. Representatives of both companies published those guidelines in a July 15, 1987 letter, see Exhibit G, to employees of both companies. Both companies agreed that AT&T would begin setting more poles; however, FPL would be required to set all concrete poles[28]. In 1992, after discussions with FPL, AT&T Director of Administration Network Operations/South announced in a letter, see Exhibit H, to his general managers that [FPL] "alleged that Southern Bell was not in compliance with the operating policy document dated July 15, 1987". He went on to state, "the purpose of the policy document was to set the direction to achieve the "objective percentage" of 47.4 percent of the joint-use poles owned by Southern Bell and 52.6 percent of the joint-use poles owned by Florida Power and Light. Neither the policy nor the objective has changed. Please review the attachment and comply." This was immediately followed by a letter on August 13, 1992 from FPL's Service Planning and Regulatory Support Manager, see Exhibit I, to FPL's field personnel advising them to notify their AT&T counterparts of "the contents of the letter (Exhibit G and Exhibit H) and encourage AT&T to set new poles. While it is obvious AT&T did not comply, since that 1992 letter, FPL has had to vigorously pursue having AT&T purchase newly installed FPL poles replacing fallen AT&T poles following major storms. For the past 24 years, AT&T has not sought to purchase any joint use poles from FPL.

35. **Pole Ownership Ratio.** While I was unable to find the pole ownership numbers for every year of the current joint use agreement, I was able to find complete[29] pole ownership numbers for 1975, 1981 and 1988 to current. The following table provides a sample of that information. A more detailed table is included as Exhibit A.

	AT&T on FPL Poles		FPL on AT&T Poles	
	Number	% Ownership	Number	% Ownership

[28] This term negotiated by AT&T exacerbated the imbalance in pole ownership as the FPSC approved wind loading requirements in 2007 have forced FPL to set more expensive concrete poles in south Florida to meet the wind loading requirements to support joint use. AT&T continues to refuse to set concrete joint use poles in FPL's territory.

[29] FPL does have some incomplete numbers for the missing years. This is due to area billing as opposed to centralized billing during those periods.

1975	253,209	59%	173,256	41%
1981	250,231	56%	196,444	44%
1988	255,374	56%	201,621	44%
1993	292,470	57%	221,948	43%
1998	322,943	56%	252,888	44%
2000	327,192	59%	228,000	41%
2005	354,797	62%	219,991	38%
2010	384,634	63%	223,311	37%
2015	399,686	64%	222,385	36%
2018	420,914	66%	213,210	34%

36. **AT&T Disregarded the Opportunity to Negotiate Comparable Rates, Terms and Conditions.** For at least the last five years, FPL has sought several times to purchase AT&T's poles that FPL is attached to with no pre-set conditions on the negotiation. AT&T had the opportunity to off-load their poles and in return, have FPL negotiate with AT&T rates, terms and conditions as well as access, through contractual obligation, comparable to other telecom carriers. AT&T never made the effort to seek comparable treatment and at one point told FPL that they do not own many towers and thus have to lease such space. Therefore, they see great value in the vertical space currently occupied on their poles. They also stated they would be willing to consider the offer if it placed them on a level playing field with other telecom providers (for example lower attachment rates). FPL noted that all these things could be considered and addressed in a newly negotiated agreement. AT&T did not follow up on FPL's idea.

IV. SUMMARY OF BENEFITS AND ADVANTAGES

37. **Benefits and Advantages.** A summary of AT&T's benefits and advantages (or alleged-competitor disadvantages) that AT&T enjoys from the JUA are included in Exhibit J.

V. NET PAYMENTS

38. **Net Payments.** I have calculated the net payments owed by one party to the other if either the pre-existing or new telecom rate (as calculated in the declaration of Renae Deaton) applied to each parties' attachments on the other's poles for the years 2014-2018. See exhibit K. If AT&T and FPL each paid one another an attachment rate at the

properly calculated pre-existing telecom rate for the years 2014-18, AT&T would owe FPL [redacted] Such payment would be appropriate for all the material benefits and advantages AT&T enjoys. If AT&T and FPL each paid one another an attachment rate at the properly calculated new telecom rate for the years 2014-18 as AT&T wrongly claims should occur, FPL would owe AT&T [redacted]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 13th, 2019

Thomas J. Kennedy, P.E.

DECLARATION OF THOMAS J. KENNEDY
List of Exhibits

Exhibit A, FPL-ATT Pole Ownership

Exhibit B, 1975 AT&T Letter

Exhibit C, New Pole Estimates

Exhibit D, Replacement Pole Estimate

Exhibit E, 1961 Joint Use Agreement

Exhibit F, EEI-Bell Report

Exhibit G, 1987 Joint Letter From AT&T and FPL Discussing JUA Operational Policy

Exhibit H, 1992 letter from AT&T Director to AT&T General Managers Advising Non-compliance with the JUA

Exhibit I, 1992 Letter form FPL Staff Manager to FPL Field Managers Advising the FPL Field Employees AT&T Intent to Comply with Their Requirements to set New Poles

Exhibit J, Summary of Advantages and Disadvantages AT&T Enjoys Over their alleged Competitors

Exhibit K, Calculation of Net Payments Owed Under Old Telecom Rate and New Telecom Rate

PUBLIC VERSION

EXHIBIT A, FPL-ATT POLE OWNERSHIP

FPL and AT&T Joint Use Pole Ownership

Year	FPL on AT&T distribution pole	AT&T Percent ownership	AT&T on FPL Distribution poles	FPL Percent Ownership
1975	173,256	41%	253,209	59%
1981	196,444	44%	250,231	56%
1987	200,404	44%	253,768	56%
1988	201,621	44%	255,374	56%
1989	202,838	44%	256,979	56%
1990	204,055	44%	258,585	56%
1991	205,271	44%	260,190	56%
1992	224,055	44%	284,429	56%
1993	228,199	44%	289,807	56%
1994	232,344	44%	295,184	56%
1995	236,490	44%	300,563	56%
1996	244,151	44%	311,771	56%
1997	249,121	44%	318,461	56%
1998	254,258	44%	325,396	56%
1999	248,211	43%	327,586	57%
2000	228,000	41%	327,192	59%
2001	229,793	41%	332,667	59%
2002	231,662	41%	338,284	59%
2003	227,661	40%	337,650	60%
2004	213,198	39%	336,087	61%
2005	219,991	38%	354,797	62%
2006	221,577	38%	364,282	62%
2007	223,606	37%	374,547	63%
2008	225,850	37%	389,411	63%
2009	225,504	37%	384,166	63%
2010	223,311	37%	384,634	63%
2011	226,080	37%	379,637	63%
2012	226,680	37%	382,839	63%
2013	226,942	37%	386,367	63%
2014	225,783	37%	392,519	63%
2015	222,385	36%	399,686	64%
2016	218,052	35%	407,659	65%
2017	216,850	34%	413,855	66%
2018	213,210	34%	420,914	66%

PUBLIC VERSION

EXHIBIT B, 1975 AT&T LETTER

C. S. Ferris
Chief Engineer
Engineering Department

Southern Bell
666 N.W. 79th Avenue
Room 644
Post Office Box 440100
Miami, Florida 33144
Phone (305) 263-3522

May 19, 1975

Mr. J. M. Tinsley
Chief Engineer
Room #815
6451 N. Fedrl Hwy.
Ft. Lauderdale, Florida

Dear Sir:

Attached for your use are three copies of the Joint Use Contract that has been executed by Southern Bell and the Florida Power and Light Company.

The effective date of this Contract is January 1, 1975. We have agreed that the procedures outlined in the new Contract including billing procedures for additional pole height or strength, etc. should take effect with requests received after May 31, 1975. Of course, the rental rates are effective for the entire year.

Some of the major changes included in the new Contract are as follows:

1. The principle of space usage recognition has been accepted by FP&L. The rental rate is based on percentage ownership reflecting space allocations of 47.4% for the Telephone Company and 52.6% for the Power Company, rather than the old reciprocal rate.

2. The adjustment rate for the calendar year 1975 will be $14.49 (FP&L's annual charge for 1974) times the deficient number of poles below our objective ownership percentage of 47.4%. Adjustment rates after calendar year 1975, will take into consideration inflationary factors and will be the average annual cost of the preceding year. The annual costs will be furnished to the Engineering Department of each Company by July of the following year. For example, the rate for calendar year 1976, will be based on actual annual costs for 1975 and will be available by July, 1976.

MAY 2 1975

ENG. MGR. - TRANS. & OS. FL

3. New attachments to special poles (concrete) are permitted at 1.5 times the normal rental rate. Attachments to special poles made prior to 1975 and other exceptions outlined in Article 10.4 will be at the normal rental rate.

4. The rental adjustment rate will remain in effect for a minimum term of five years.

At the end of 1974, the ownership of joint use poles by FP&L and Southern Bell in each of the Florida Areas was as follows:

Area	Sou. Bell Att. on FP&L Poles	%	FP&L Att. on Sou. Bell Poles	%	Total	Absolute Difference	Difference Based on Sou. Bell Objective Ownership
North	71,745	68.9	32,311	31.1	104,056	39,434	17,011
Southeast	92,193	52.0	84,999	48.0	177,192	7,194	(1,010)
South	89,271	61.5	55,946	38.5	145,217	33,325	12,887
TOTAL	253,209	59.4	173,256	40.6	426,465	79,953	28,888

Since it is expected that the annual adjustment rate will increase in subsequent years, all of the Areas should continue efforts to reach our objective percentage of pole ownership as early as practicable. This would reduce the effect of the higher rental rate.

Pole rental billing will be on a total state wide basis rather than by individual areas as in the past. This procedure has been concurred in by the Accounting Department and the details will be forwarded to you in a separate letter.

If you have any questions concerning the new Contract, please contact A. M. Priester, Engineering Manager - Transmission and Outside Plant, South Florida Area.

Yours truly,

C. S. Jones

Chief Engineer

Attachments

TO: Chief Engineers - Florida
General Plant Managers - Florida

cc: General Accounting Managers - Florida
Mr. E. B. Rudolph

PUBLIC VERSION

EXHIBIT C, NEW POLE ESTIMATES

PUBLIC VERSION

JOB COST ESTIMATE

WR Number : 4118501 | Design Number : 1 | Design Description : STANDARD

WR Type : DESG | Job Type : 79A - CAP-New Residential | Job Code :

WR Description : 45/1 bare pole now has 45/2 pole

Job Address : N/A 45/1 CCA Bare Pole cost for FERC
Miami

Project :
Mgmt. Area : SP
SVC Ctr : DCP
Assigned To : Erik Dillenkofer
Designed By : David Caroll

Items	Install	Remove	Abandon
Poles	1	0	0
Primary Wire	0	0	0
Street Lights	0	0	0
Transformers	0	0	0
Switch Cabinets	0	0	0
Pri. UG Conductor	0	0	0

Estimated Construction Man Hours	Company	Contractors
Overhead	3	0
Underground	0	0
Cable Splicer	0	0
Total	3	0

Customer Contribution	
Cash	0
Material & Labor	0
Total	0

CNTR RATE : Company | LABOR RATE :

IO # : | ENTITY : | EAR :

Total Cost of Job $894.37 + Salvage Cost $0 = Authorized Amount $894

ESTIMATE OF COST

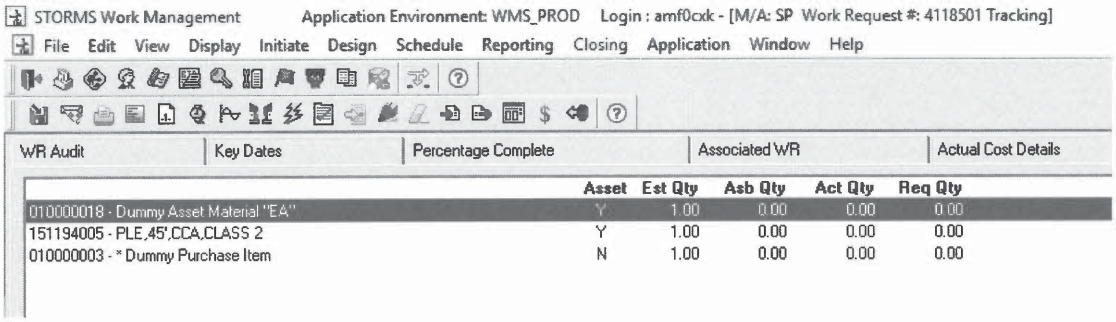
Retirements				Property Additions, Operations & Maintenance			
Orig. Cost Acct 108.2	Salvage Cost Acct 108.4	Removal Cost Acct 108.3	Description	Labor Vehicle & Misc.	Materials	Other	Total
0	0	0	CAPITAL	375	374	0	749
			ENGR & OVERHEAD			145	145
0	0	0	TOTAL CHARGBL TO WR	375	374	145	894
			OPERATION & MAINTENANCE	0	0	0	0
			NET PLANT ITEMS - P		0		0
			TOTAL COST OF WR	375	374	145	894
			SALVAGE		0		0
			TOTAL COST OF JOB	375	374	145	894

APPROVAL / AUTHORIZATION

CAP: 100.00% O&M: 0.00%

Approval Required From	Approved By	Date	Status

Required Date : 12/12/2020 Last Estimated Date : 07/23/2019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Key Dates
Percentage Complete
Associated WR
Actual Cost Details
Asset Est Qty Asb Qty Act Qty Req Qty
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151194005 - PLE,45',CCA,CLASS 2 Y 1.00 0.00 0.00 0.00
010000003 - * Dummy Purchase Item N 1.00 0.00 0.00 0.00

PUBLIC VERSION

JOB COST ESTIMATE

WR Number : 4118515 Design Number : 1 Design Description :

WR Type : DESG Job Type : 79A - CAP-New Residential Job Code :

WR Description : 35/4 bare pole

Job Address : N/A 35/4 CCA Bare Pole cost for FERC Miami

Project
Mgmt. Area SP
SVC Ctr DCP
Assigned To Erik Dillenkofer
Designed By David Caroll

Items	Install	Remove	Abandon
Poles	1	0	0
Primary Wire	0	0	0
Street Lights	0	0	0
Transformers	0	0	0
Switch Cabinets	0	0	0
Pri. UG Conductor	0	0	0

Estimated Construction Man Hours	Company	Contractors
Overhead	2	0
Underground	0	0
Cable Splicer	0	0
Total	2	0

Customer Contribution	
Cash	0
Material & Labor	0
Total	0

CNTR RATE : Company LABOR RATE :

IO # : ENTITY : EAR :

Total Cost of Job $633.64 + Salvage Cost $0 = Authorized Amount $634

ESTIMATE OF COST

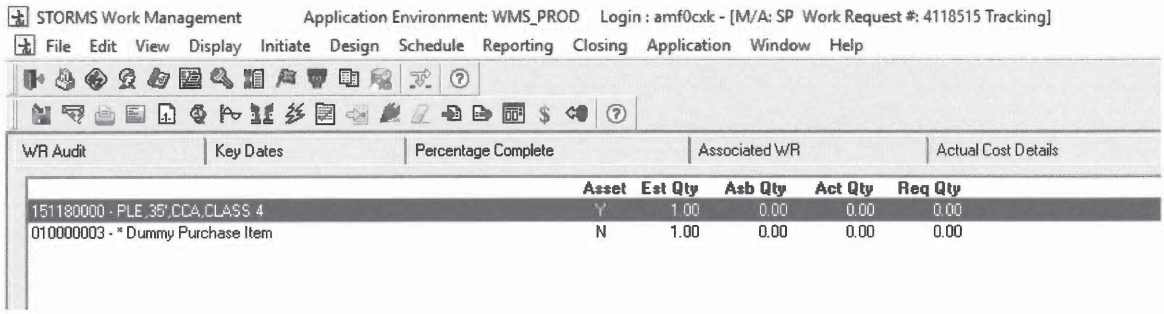
Retirements				Property Additions, Operations & Maintenance			
Orig. Cost Acct 108.2	Salvage Cost Acct 108.4	Removal Cost Acct 108.3	Description	Labor Vehicle & Misc.	Materials	Other	Total
0	0	0	CAPITAL	337	193	0	530
			ENGR & OVERHEAD			104	104
0	0	0	TOTAL CHARGBL TO WR	337	193	104	634
			OPERATION & MAINTENANCE	0	0	0	0
			NET PLANT ITEMS - P		0		0
			TOTAL COST OF WR	337	193	104	634
			SALVAGE		0		0
			TOTAL COST OF JOB	337	193	104	634

APPROVAL / AUTHORIZATION

CAP: 100.00% O&M: 0.00%

Approval Required From	Approved By	Date	Status

Required Date : 12/12/2020 Last Estimated Date : 07/23/2019


STORMS Work Management
Application Environment: WMS_PROD
Login : amf0cxk - [M/A: SP Work Request #: 4118515 Tracking]
File Edit View Display Initiate Design Schedule Reporting Closing Application Window Help
WR Audit
Key Dates
Percentage Complete
Associated WR
Actual Cost Details
Asset Est Qty Asb Qty Act Qty Req Qty
151180000 - PLE,35',CCA,CLASS 4 Y 1.00 0.00 0.00 0.00
010000003 - * Dummy Purchase Item N 1.00 0.00 0.00 0.00

PUBLIC VERSION

EXHIBIT D, REPLACEMENT POLE ESTIMATE

PUBLIC VERSION

[X] INACCESSIBLE [X] 13KV [ ] FUTURE 23KV [ ] 23KV [ ] SALT SPRAY [ ] ROCK

Location:

PIP Image NOT Set

ADDRESS: --------
CITY, COUNTY: ---------
POLE ID: --------
MANAGEMENT AREA: --------
GPS COORDINATES: ----------
SUBSTATION: ---------
FEEDER: --------

MOT 602

NO PIP IMAGE OR LOCATION SET AS THIS WR IS JUST TO DEMONSTRATE WHAT A TYPICAL/STANDARD INACCESSIBLE POLE REPLACEMENT LOOKS LIKE

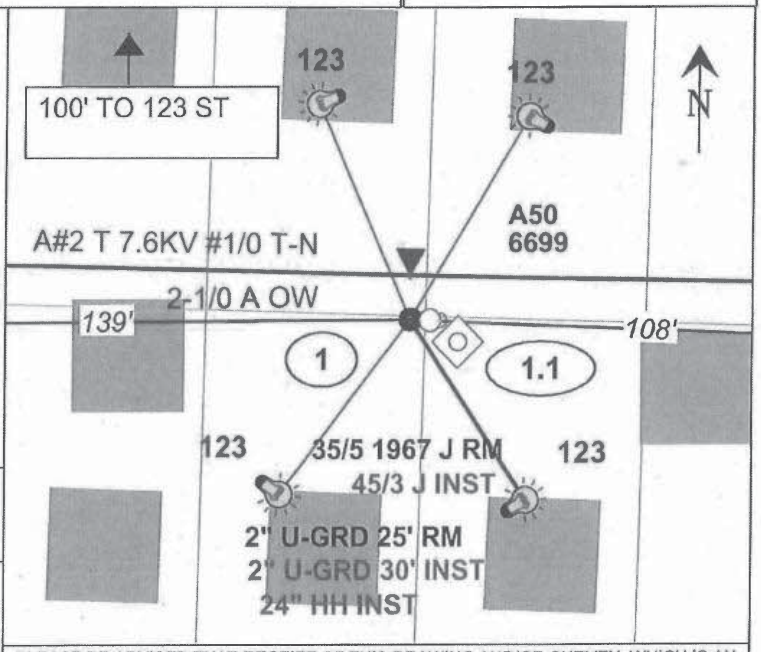
ZERO TODAY!

PRE-ARRANGED
OUTAGE NOTIFICATION
REQUIRED AT
TLN ----------
1-HR DURATION

LOC 1: INACCESSIBLE / (ADDRESS)
REPLACE 35/5 W/ 45/3 WOOD POLE
TRANSFER A50 KVA TX TO NEW POLE
TLN ----------
FRAME PER DCS I-41.0.0
REPLACE RISER PER DCS L-17.0.6
INSTALL HANDHOLE
TRANSFER FACILITIES

LOC 1.1: RETURN TRIP TO PULL POLE

Location Not Set



Feet of ground rod installed _____
Ground Resistance (Ohms) _____

American Disabilities Act
If pole placement location does not meet the minimum single point distance of 32" from edge of curb or back of sidewalk, contact your Production Lead, for further instructions.

PLEASE BE ADVISED THAT RECEIPT OF THIS DRAWING AND/OR SURVEY, WHICH IS AN APPROXIMATION, DOES NOT RELIEVE YOU OF ANY STATUTORY OBLIGATIONS, INCLUDING THE PROVISIONS CONTAINED IN SECTION 556, FLORIDA STATUTES. CALL 811 (Sunshine811) PRIOR TO ANY EXCAVATION ACTIVITIES

AS-BUILT CREW PRINT	ALL REQUIRED GROUND RODS HAVE BEEN DRIVEN & VERIFIED TO BE WITHIN FPL STANDARDS. VALUES ARE SHOWN AT ALL LOCATIONS.	JOB CERTIFIED COMPLETED AS SHOWN ON THIS AS-BUILT PRINT. MATERIAL CHANGES SHOWN ON ROS.	AS-BUILT COPY
Foreman's Signature / Date	Foreman's Signature / Date	Supervisor's Signature / Date	Initials / Cert. Date

Easement? [ ]	Tree Work? [ ]	Tree Access? [ ]	Tree Staking Req'd? [ ]	FPL	M/A: WB	Township: 41 Range: 42 Section 02	
Designer/Stake? [ ]	CT/Special Mtr? [ ]	Work with SMO? [ ]	Survey/Stake? [ ]	F401831 ATTwith FPL POLE REPLACEMENT			
PERMIT REQ'D: CITY [ ]	COUNTY RD [ ]	COUNTY AIR [ ]	STATE RD [ ]	FAA [ ]			
WMD [ ]	RR XING [ ]	DR. DIST. [ ]	TRANSM. [ ]	401831 1 JUPITER SUB, JUPITER, 33458			
Requested Tel. Co. Set Poles? [ ]	Tele. Attachment Per			Job Owner: Rosirys Quezoda Rivera	Date: 08/01/2019		
Requested Tel. Co. Transfer? [ ]				Designer: Mark Desantis	Dwg No. 8964385_8x11 PIP.xml		
Request CATV Transfer? [ ]				Scale: 1" = 40'	0' 40' 80'		
POLE LINE FT:	DUCT BANK FT:			Map No. T0484			
POLE LINE FT. ON TRANSM. POLES:	TRENCH FT:			WR: 8964385	Page 1 of 1		

Size: 8 x 11
PRINTED BY: mxd00ej
PLOT DATE/TIME: 08/01/2019 10:00:59

FPL00035

PUBLIC VERSION

JOB COST ESTIMATE

WR Number : 8964385 | Design Number : 1 | Design Description :

WR Type : DESG | Job Type : 61A - CAP-DSP Pole Replacement Program | Job Code :

WR Description : F401831 ATTwith FPL POLE REPLACEMENT

Job Address : 401831 JUPITER SUB
JUPITER

Project	2018 Pole Inspection, YE
Mgmt. Area	WB
SVC Ctr	JPO
Assigned To	Rosirys Quezada
Designed By	FPLBATCH13

Items	Install	Remove	Abandon
Poles	1	1	0
Primary Wire	0	0	0
Street Lights	0	0	0
Transformers	0	0	0
Switch Cabinets	0	0	0
Pri. UG Conductor	0	0	0

Estimated Construction Man Hours	Company	Contractors
Overhead	30	0
Underground	5	0
Cable Splicer	0	0
Total	35	0

Customer Contribution	
Cash	0
Material & Labor	0
Total	0

CNTR RATE : Company | LABOR RATE :

IO # : | ENTITY : | EAR :

Total Cost of Job $6876.79 + Salvage Cost $0 = Authorized Amount $6877

ESTIMATE OF COST

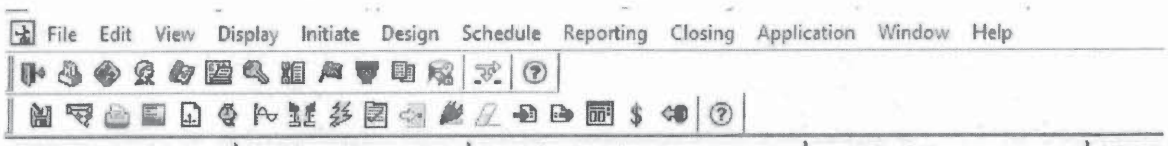
Retirements				Property Additions, Operations & Maintenance			
Orig. Cost Acct 108.2	Salvage Cost Acct 108.4	Removal Cost Acct 108.3	Description	Labor Vehicle & Misc.	Materials	Other	Total
113	0	1,519	CAPITAL	4,180	908	0	5,087
			ENGR & OVERHEAD			1,006	1,006
113	0	1,519	TOTAL CHARGBL TO WR	4,180	908	1,006	6,093
			OPERATION & MAINTENANCE	784	0	0	784
			NET PLANT ITEMS - P		0		0
			TOTAL COST OF WR	4,964	908	1,006	6,877
			SALVAGE		0		0
			TOTAL COST OF JOB	4,964	908	1,006	6,877

APPROVAL / AUTHORIZATION

CAP: 88.60% O&M: 11.40%

Approval Required From	Approved By	Date	Status

Required Date : 12/31/2019 Last Estimated Date : 08/01/2019



WR Audit | Key Dates | Percentage Complete | Associated WR | Actual C

	Asset	Est Qty	Asb Qty	Act Qty	Req Qty
010000018 - Dummy Asset Material "EA"	Y	1.00	0.00	0.00	0.00
151193009 - PLE,45',CCA,CLASS 3	Y	1.00	0.00	0.00	0.00
010000003 - * Dummy Purchase Item	N	2.00	0.00	0.00	0.00
010000013 - *Linear Dummy Purchase Item	N	5.00	0.00	0.00	0.00
100250005 - CABLE,ALUM 600V 1/0 3C TPLX HM/HD POLY	N	41.20	0.00	0.00	0.00
100365007 - TIE,INS,PREFORMED LOOP ENDS,#4 AL	N	2.00	0.00	0.00	0.00
100406005 - WIRE,TIE,#4,250' SPOOL,SOFT DRAWN,ALUM	N	18.00	0.00	0.00	0.00
103425001 - SPL,SVC ENT SLV,INSUL,#2-2 STR	N	3.00	0.00	0.00	0.00
104832009 - STIRP,BLTED CLAMP,1 AWG CU LOOP,4-3/0 AL	N	1.00	0.00	0.00	0.00
111597007 - CND,COVERED, 25 KV, #4C SOLID TAP WIRE	N	14.00	0.00	0.00	0.00
112308003 - WIRE,TIE,#6,315' SPL,SOL,SDB,CU	N	50.00	0.00	0.00	0.00
112332010 - WIRE/CABLE,BARELEC,7 STRAND SD,2 AWG,CU	N	1.50	0.00	0.00	0.00
120036106 - CLMP,GRD,WIRE TO ROD,5/8"	N	1.04	0.00	0.00	0.00
120064002 - CLMP,HOT LINE,#8-#2/0C TAP #8-#1/0C	N	1.00	0.00	0.00	0.00
120111001 - CON,CU,CMPR,H-TYPE,#8-4 CU TO #8-4 CU	N	3.00	0.00	0.00	0.00
120600006 - CLMP,GRD,CABLE TO BOLT,6 AWG CU-3/4" BOL	N	1.00	0.00	0.00	0.00
130405104 - ROD,GRD,BRZ,COUPLING	N	7.04	0.00	0.00	0.00
130613009 - ROD,GRD,5/8",5'LG,THREADLESS,COPPER-CLAD	N	8.00	0.00	0.00	0.00
131116203 - INSULATOR,45KV,POLYMER F-NECK LINE POST	N	1.00	0.00	0.00	0.00
140591008 - BLT,MA,5/8"X 12"	N	2.00	0.00	0.00	0.00
140592004 - BLT,MA,5/8"X 14"	N	5.00	0.00	0.00	0.00
141248005 - BRACKET, POLE TOP, GALVANIZED	N	1.00	0.00	0.00	0.00
141250008 - BRACKET, FIBERGLASS TO MOUNT ARR & CTO	N	1.00	0.00	0.00	0.00
141707001 - FORK,EXTENDED,INSULATED CLEVIS GAL	N	3.00	0.00	0.00	0.00
142631007 - NAIL,GROOVED 2-1/2	N	0.02	0.00	0.00	0.00
143098001 - BOLT, STUD 3/4"X 1-3/4"	N	1.00	0.00	0.00	0.00
144304003 - SCR,LAG,TWIST DRIVE,1/2" DIA,4" LG,PILOT	N	3.00	0.00	0.00	0.00
144405004 - INS,SPOOL,HDPE,ANSI 53-2,SMALL,GRAY	N	3.00	0.00	0.00	0.00
144505009 - STAPLE, 1-1/2"X 3/8"X .148"	N	0.50	0.00	0.00	0.00
145359006 - WASHER, STEEL ROUND 3/8 BOLT	N	8.00	0.00	0.00	0.00
145374005 - WASHER, SPRING, 5/8" BOLT	N	14.00	0.00	0.00	0.00
145382008 - WASHER, SPRING, LOCK, 5/8" BOLT	N	2.00	0.00	0.00	0.00
145395002 - WASHER,SQ,2-1/4"X 3/16",WITH 13/16 HOL	N	9.00	0.00	0.00	0.00
162120008 - HH,POLY CNC,RECT,13"X 24"X 18" DEEP	N	1.00	0.00	0.00	0.00
164660000 - RSR,2",10' LG,SCH 40 PVC OR HDPE U-GUARD	N	3.00	0.00	0.00	0.00
164662002 - RSR,U-GUARD BACKPLATE,2" SCH 40 X 10' LG	N	1.00	0.00	0.00	0.00
164663009 - BOOT,RISER ADAPTER,2",SCH 40 PVC OR HDPE	N	1.00	0.00	0.00	0.00
330707050 - CTO,FUSE,OPEN D-O EXP HEAVY DUTY 100A 27	N	1.00	0.00	0.00	0.00
500100006 - SCR,MASONRY,1/4"X 1-3/4" LONG,HEXHEAD	N	16.00	0.00	0.00	0.00
522116002 - COM,CABLE PULLING,5 GAL PAIL	N	0.04	0.00	0.00	0.00
522126008 - COM,INSULATING,600V AND BELOW,10' ROLL	N	0.50	0.00	0.00	0.00
532130016 - TAPE,LINERLESS,SELF-FUSING,RUB,1-1/2" WD	N	0.30	0.00	0.00	0.00
548800083 - IDENTIFICATION,CARRIER FOR TLM NUMBERS	N	1.00	0.00	0.00	0.00

EXHIBIT E, 1961 JOINT USE AGREEMENT

PUBLIC VERSION

Dated Aug. 1, 1961
Effective Jan. 1, 1960

20021

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00022

THIS AGREEMENT, made this 1st day of May 196-, by and between FLORIDA POWER & LIGHT COMPANY, incorporated under the laws of the State of Florida, hereinafter called the "Electric Company", party of the first part, and SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, a corporation of the State of New York, hereinafter called the "Telephone Company", party of the second part:

WITNESSETH:

WHEREAS, the Electric Company and the Telephone Company desire to cooperate in accordance with the "Principles and Practices for the Joint Use of Wood Poles by Supply and Communication Companies" as contained in the report of the Joint General Committee of the Edison Electric Institute and the Bell Telephone System dated July, 1945, and amendments thereto, and to establish joint use of their respective poles when and where joint use shall be of mutual advantage; and

WHEREAS, the conditions determining necessity or desirability of joint use depend upon service requirements to be met by both parties, including considerations of safety and economy, and each of them should be the judge of what the character of its circuits should be to meet its service requirements and as to whether or not these service requirements can be properly met by joint use of poles;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto, for themselves, their successors and assigns, do hereby covenant and agree as follows:

ARTICLE I

DEFINITIONS

For the purpose of this agreement, the following terms, when used herein, shall have the following meanings:

A. STANDARD SPACE - means sufficient space on a joint use pole for use of each party, taking into consideration requirements of the National Electrical Safety Code.

Except only as to the portion of its said space which, by the terms of the National Electrical Safety Code, may be occupied by certain attachments therein described of the other party, this space is specifically defined as follows:

(1) for the Electric Company: the uppermost 6 feet;
(2) for the Telephone Company, a space of 4 feet at sufficient distance below the space of the Electric Company to provide at all times the minimum clearance required by the specifications referred to in Article IV, and at sufficient height above the ground to provide proper vertical clearance for the lowest horizontally run line wires or cables attached in such space.

B. NORMAL JOINT USE POLE - means a pole which meets the requirements of the National Electrical Safety Code for support and clearance of supply and communication conductors under conditions existing at the time joint use is established, or is to be created under known plans of either party. Specifically, a normal joint use pole under this agreement shall be a 40 foot class 5 wood pole, complete with pole ground of #6 copper or equivalent.

The foregoing definition of "a normal joint use pole" is not intended to preclude the use of joint use poles shorter or of less strength than the normal joint use pole in locations where such poles will meet the known or anticipated requirements of the parties hereto.

C. ATTACHMENTS - mean materials or apparatus now or hereafter used by either party in the construction, operation or maintenance of its plant carried on poles.

D. OWNER - means the party owning the pole to which attachments are made.

E. LICENSEE - means the party having the right under this agreement to make attachments to a pole of which the other party is the Owner.

ARTICLE II

TERRITORY AND SCOPE OF AGREEMENT

A. This agreement is based on the premise that each party shall own approximately one-half of the total number of poles jointly used.

B. This agreement shall apply to all poles of each party that, as of this date, are used jointly by both parties.

C. This agreement shall apply to all poles of each party that are hereafter erected or acquired excepting poles which in the Owner's judgment are necessary for its sole use.

D. This agreement shall be extended to include poles not covered by Sections B and C of this Article, upon mutual agreement of the parties, in each specific case.

ARTICLE III

PERMISSION OF JOINT USE

Each party hereto hereby permits joint use by the other party of any of its poles when brought under this agreement as herein provided, subject to the terms and conditions herein stated.

ARTICLE IV

SPECIFICATIONS

A. Joint use of poles covered by this agreement shall at all times be in conformity with terms and provisions of the current issue of the National Electrical Safety Code, as to minimum requirements, and such revisions and amendments thereto from time to time as may be necessary by reason of developments and improvements in the art as may be mutually agreed upon and approved in writing by the Chief Engineer of the Electric Company and the Chief Engineer of the Telephone Company.

B. Edison Electric Institute Publication M-12, a report of the Joint Committee on Plant Coordination of the Edison Electric Institute and the Bell Telephone System, based on the National Electrical Safety Code, and such revisions and amendments thereto as may be made from time to time is to be used as a guide in administration of this agreement.

ARTICLE V

RIGHT OF WAY FOR LICENSEE'S ATTACHMENTS

A. The Owner will obtain a right of way, suitable for both parties on joint use poles insofar as practicable. Right of way easements shall be in sufficient detail for identification and recording when required. Easements shall be subject to inspection by the other party upon request.

B. Where reasonably practicable, the new right of way obtained will extend 6 feet on each side of the center of the pole line except where dedication or grant otherwise restricts, and shall be cleared of undergrowth to the extent practicable for the protection of the circuits of both parties.

C. Trimming, insofar as side clearance, shade trees, etc., are concerned, where the normal clearing of the right of way swath is insufficient, shall be the responsibility of each party for its own circuits. Where it is mutually agreed that subsequent trimming is beneficial to both parties, the parties shall agree beforehand upon an equitable sharing of costs.

D. While the Owner and the Licensee will cooperate as far as may be practicable in obtaining rights of way for both parties on joint use poles, no guarantee is given by the Owner of permission from property owners, municipalities or others for the use of poles by the Licensee, and if objection is made thereto and the Licensee is unable to adjust the matter satisfactorily within a reasonable time, the Owner may at any time upon thirty (30) days' notice in writing to the Licensee, require the Licensee to remove its attachments from the poles involved, and the Licensee shall, within thirty (30) days after receipt of said notice, remove its attachments from such poles at its sole expense. Should the Licensee fail to remove its attachments as herein provided, the Owner may remove them at the Licensee's expense without any liability whatever for such removal or the manner of making it, for which expense the Licensee shall reimburse the Owner on demand.

ARTICLE VI

PROCEDURE FOR ATTACHMENTS AND POLES

A. On pole lines of either party where joint use of poles has been established or is common practice, either party desiring to place attachments on a pole owned by the other may do so without prior notification or specific permission, provided:

(1) The proposed attachments are not of unusual size or character as determined by common usage in that area;

(2) The addition of the proposed attachments will not violate strength, clearances, or other specifications referred to in Article IV;

(3) The owner of the pole has not specifically excluded that pole, pole line or general type of construction from joint use by previous agreement or written notification.

B. Whenever either party desires to place attachments on a pole of the other that does not fulfill the requirements of preceding Section A, or desires the Owner to replace existing or erect additional poles to accommodate the proposed attachments, it shall make a written request with respect thereto to the Owner. Such request shall specify the location and description of the pole or poles in question. Within ten (10) days after receipt of such request, the Owner shall notify the applicant in writing that one or more of the following applies:

(1) The pole or poles in question are excluded from joint use under the provisions of Article II, Section C, or

(2) The attachments may be made as proposed and any additions, rearrangements or changes to Owner's facilities necessary to accommodate the proposed attachments shall be made at Owner's expense, or

(3) The attachments may be made as proposed, but the nature of the attachments is such that construction in addition to that required for normal joint use is necessary, or the pole was not originally erected for joint use, and the Licensee shall participate in the cost in accordance with Section C of this Article. In such cases, the Owner will include a description of work to be done and specify estimated charges to the Licensee. The Licensee will then notify the Owner within ten (10) days whether or not the Owner should proceed with the necessary work.

C. (1) Except as otherwise provided in Section C (5) of this Article, whenever the Owner of an existing or proposed joint use pole line is requested by the Licensee to erect an additional pole, or to replace an existing pole, to accommodate the attachments of the Licensee, the Owner shall promptly erect or replace said pole without cost to the Licensee, provided that:

(a) A normal joint use pole is sufficient for the requirements of the Licensee, and

(b) The required pole, at the time of its erection or in the foreseeable future, will, in the opinion of the Owner, be of direct benefit to the Owner.

(2) Whenever the Licensee requests the Owner of an existing or proposed joint use pole line to erect an additional pole which at the time of its erection or in the foreseeable future will not, in the opinion of the Owner,

be of direct benefit to the Owner, the Owner shall promptly erect said pole and the Licensee shall pay to the Owner the entire cost of the pole in place plus the associated cost of attaching and/or rearranging the Owner's facilities, if any.

(3) Whenever the Owner is requested to erect an additional or replacement pole taller or stronger than the normal joint use pole, the extra height and strength of which is due wholly to the Licensee's requirements, the Owner shall promptly erect such pole and the Licensee shall pay to the Owner a sum equal to the difference between the cost in place of such pole and the cost in place of a normal joint use pole plus, in the case of a replacement pole, a sum equal to the unused life of the pole replaced (in plant cost of pole replaced plus removal cost less salvage). Where the extra height and strength is due to the requirements of both parties, or is needed in order to meet the requirements of public authority or of property owners, the Licensee shall pay to the Owner one-half the foregoing amount. For administrative purposes, a simplified method of billing mutually acceptable and annually adjusted may be utilized.

(4) Whenever the Owner of an existing or proposed joint use pole line is required to erect an additional pole in the line for his use, the Licensee shall attach his wires thereto at no cost to the Owner.

(5) Whenever the Licensee requests the Owner of an existing non-joint use pole or pole line to make such changes as may be necessary to accommodate attachments proposed by the Licensee and, at the time of its erection, joint use was not desired by the other party, or construction for joint use was obviously not appropriate, the Licensee shall pay to the Owner the entire cost of changes to the pole or pole line necessary to accommodate the proposed attachments, including the associated cost of attaching and/or rearranging the Owner's existing facilities, if any. Credit shall be allowed the Licensee for unused life, if any, of facilities replaced by the Owner in connection with such work.

(6) Whenever, in any emergency, the Licensee replaces a pole of the Owner, the Owner shall reimburse the Licensee all costs and expenses that would otherwise not have been incurred by the Licensee if the Owner had made the replacement; and the Owner shall deliver

to the Licensee a pole of equal height and strength as that used in the replacement.

D. Whenever it is necessary to replace or change the location of a jointly used pole, the Owner shall, before making such replacement or change in location, give notice thereof in writing (except in cases of emergency when verbal notice can be given and subsequently confirmed in writing) to the Licensee, specifying in such notice the time of such proposed replacement or relocation, and the Licensee shall, at the time so specified or as soon as practicable thereafter, transfer its attachments without cost to the Owner.

E. Whenever either party determines that an additional pole line or an extension to an existing pole line is necessary and such pole line is not excluded from joint use under the provisions of Article II, it shall notify the other in writing at least thirty (30) days before work is scheduled to begin (shorter notice, including verbal notice subsequently confirmed in writing may be given in cases where circumstances require) of its requirements in connection with the proposed construction. The other party shall reply in writing within ten (10) days whether or not joint use either immediately or in the foreseeable future is desired. If joint use is desired, the party owning the least number of joint use poles shall erect the poles required for the proposed addition unless the parties mutually agree otherwise. If joint use of the proposed addition is not desired, the proposed addition when completed becomes a non-joint use line. If, at a later date, joint use of such pole line becomes desirable, the Licensee shall pay to the Owner the entire cost associated with making the line suitable for joint use, except as otherwise provided in Article VI, Section C-1.

F. In any case where the parties hereto shall conclude arrangements for the joint use hereunder of any new poles to be erected, the Owner of such poles shall be determined by mutual agreement, to the end that each party hereto shall at all times own approximately one-half the total number of poles jointly used under this agreement. In the event of disagreement, as to ownership, the party then owning the smaller number of joint poles under this agreement, shall erect the new joint poles and be the owner thereof.

G. The parties hereto agree that mixed ownership of poles in short sections of lines is undesirable and the divisions of ownership shall normally be made at street intersections or other geographical reference points. This does not preclude either party from erecting service poles or guy poles for its

sole use even though these poles may be used at some future date by the other party.

H. Except as herein otherwise expressly provided, each party shall place, maintain, rearrange, transfer and remove its own attachments, and shall at all times perform such work promptly and in such a manner as not to interfere with work being done by the other party.

I. Each party will install anchors and guy wires necessary to hold its own attachments unless mutually agreed otherwise.

J. When replacing a jointly used pole carrying attachments such as terminals on aerial cable or underground connections, the new pole shall be set in the same hole which the replaced pole occupied, unless special conditions make it necessary or mutually desirable to set it in a different location.

ARTICLE VII

MAINTENANCE OF POLES AND ATTACHMENTS

A. The Owner shall, at its own expense, maintain its joint use poles in safe and serviceable condition, and in accordance with Article IV of this agreement and the requirements of the National Electrical Safety Code, and shall replace subject to the provisions of Article VI, such of said poles as become defective.

B. Each party shall, at its own expense, at all times maintain all of its attachments in accordance with Article IV of this agreement and the National Electrical Safety Code and keep them in safe condition and thorough repair.

ARTICLE VIII

PROCEDURE WHEN CHARACTER OF CIRCUITS IS CHANGED

A. Where joint use has been established and either party desires to change the character or operating condition of its circuits on such joint poles, so that they are not covered by the terms of the governing specifications, such party shall give sixty (60) days notice to the other party of such contemplated change; and in the event that the other party agrees to joint use with such changed circuits, then joint use of such poles shall be continued, and the construction

shall be in accordance with the terms of the governing specifications and of the National Electrical Safety Code, and such revisions thereof as may be made from time to time. In no case shall a change in distribution voltage be construed as a change in character of circuits.

B. In the event, however, that the other party fails within thirty (30) days from the receipt of such notice to agree in writing to such change, then both parties shall cooperate in accordance with the following plan: (1) The parties hereto shall determine what circuits shall be removed from the joint poles involved, and the net cost of establishing in a new location such circuits or lines as may be necessary to furnish the same business facilities that existed in the joint use referred to at the time such change was decided upon; and (2) the costs of moving such circuits to the new location shall be equitably apportioned between the parties hereto. In the event of disagreement as to which party's circuits shall be removed from such joint poles, the circuits whose moving shall involve the least total cost shall be moved to the new location. In the event of disagreement as to what constitutes an equitable apportionment of such costs, the said costs shall be borne by the Licensee.

C. Unless otherwise agreed by the parties, ownership of any new line constructed under the foregoing provision in a new location shall vest in the party for whose use it is constructed. The net cost of establishing service in the new location shall be exclusive of any increased cost due to the substitution for the existing facilities of other facilities of a substantially new or improved type or of increased capacity, but shall include the cost of the new pole line including rights of way, the cost of removing attachments from the old poles to the new location and the cost of placing the attachments on the poles in the new location.

ARTICLE IX

BILLS AND PAYMENTS FOR WORK

Upon the completion of work performed hereunder by either party, the expense of which is to be borne wholly or in part by the other, the party performing the work shall present to the other party, within forty-five (45) days after the completion of such work, a statement showing the amount due, and such other party shall, within forty-five (45) days after such statement is presented, pay such amount.

ARTICLE X

ABANDONMENT OF JOINTLY USED POLES

A. If the Owner desires at any time to abandon any jointly used pole, it shall give the Licensee notice in writing to that effect at least thirty (30) days prior to the date on which it intends to abandon such pole. If, at the expiration of said period, the Owner shall have no attachments on such pole but the Licensee shall not have removed all of its attachments therefrom, such pole shall thereupon become the property of the Licensee, and the Licensee shall save harmless the former Owner of such pole from all obligation, liability, damages, cost, expenses or charges incurred thereafter, because of, or arising out of the presence or condition of such pole or any attachments thereon; and shall pay the Owner a sum equal to the then value in place of such abandoned pole, or such other equitable sum as may be agreed upon between the parties. Credit shall be allowed for any payments which the Licensee may have made toward the cost of the pole when originally set, provided the Licensee furnishes proof of such payment.

B. The Licensee may at any time abandon the use of a joint use pole by removing therefrom any and all attachments it may have thereon and by giving due notice thereof in writing to the Owner.

ARTICLE XI

RENTAL AND PROCEDURE FOR PAYMENT

The parties contemplate that the use of or reservation of space on poles by each party, as Licensee of the other under this agreement, shall be reciprocal and mutual insofar as this may be practicable.

A. In the event the number of poles occupied by one of the parties as Licensee under this agreement, or specifically reserved for Licensee's use during any one year, shall exceed the number of poles occupied by the other party, or specifically reserved for such party's use during such year, the party occupying the greater number of poles shall pay to the other party as rental the sum of $3.60 for each pole comprising the excess, as hereinafter provided.

B. Within 30 days after the first day of January, 1961, and within 30 days after the first day of January each year

thereafter, during the time this agreement shall be in effect, each party hereto shall submit to the other a written statement setting forth the number of joint use poles which are owned as of the first day of January by the party submitting such statement.

C. Within 60 days after the receipt of such written statement, the party occupying the greater number of jointly used poles as Licensee, unless such party disputes the accuracy of such statement within ten (10) days from the receipt thereof, shall pay to the other party the rental provided for in this Article, based on the excess number of poles as shown in such written statement.

D. Effective with the date of this agreement and during the life of this agreement, unless otherwise agreed upon, subsequent joint field inventories are to be made at intervals not to exceed five (5) years. Upon completion of such inventories, the office records for the areas inventoried will be adjusted accordingly and subsequent billing will be based on the adjusted numbers of attachments. The adjustment in the numbers of attachments is also to be prorated on a straight-line basis over the years elapsed since the preceding inventory. Retroactive billing for the prorated adjustment will be computed by years and compared with the actual billing with any difference added or credited to the normal billing for the year following such inventory.

ARTICLE XII

PERIODIC REVISION OF RENTAL PAYMENT RATE

At any time after four (4) years from the effective date of this agreement, and at intervals of not less than five (5) years thereafter, the rental payment rate applicable under this agreement shall be subject to review and revision upon the written request of either party. If the parties fail to agree upon a revision of such rate within six months of the date of said written request, the party owning the smaller number of poles shall, at its option, either (1) purchase at the in plant cost less depreciation, a sufficient number of poles from the party owning the larger number, to satisfactorily equalize ownership, or (2) pay a revised rate per pole equal to one half of the annual fixed charges on the average unit in plant cost of all of the poles of both companies covered by this agreement. Upon revision, the new rental rate shall apply starting with the annual bill next rendered and continuing until again revised.

ARTICLE XIII

DEFAULTS

If either party shall be in default in fulfilling any of its obligations under this agreement and such default shall continue thirty (30) days after notice thereof in writing from the other party, all rights of the party in default hereunder pertaining to the establishment of future joint use shall be suspended, and if such default shall continue for a period of ninety (90) days after such suspension, the other party may forthwith terminate the right of both parties to make additional attachments. Any such termination of right to make additional attachments by reason of any such default shall not, however, abrogate or terminate the right of either party to maintain the attachments theretofore made on the poles of the other, and all such prior attachments shall continue thereafter to be maintained pursuant to and in accordance with the terms of this agreement, which agreement shall, so long as said attachments are continued, remain in full force and effect solely for the purpose of governing and controlling the rights and obligations of the parties with respect to said attachments.

ARTICLE XIV

LIABILITY AND DAMAGES

Whenever any liability is incurred by either or both of the parties hereto for damages for injuries to the employees or for injury to the property of either party, or for injuries to other persons or their property, arising out of the joint use of poles under this agreement, or due to the proximity of the wires and fixtures of the parties hereto attached to the jointly used poles covered by this agreement, the liability for such damages, as between the parties hereto, shall be as follows:

A. Each party shall be liable for all damages for such injuries to persons or property caused solely by its negligence or solely by its failure to comply at any time with the specifications as provided herein.

B. Each party shall be liable for all damages for such injuries to its own employees or its own property that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

C. Each party shall be liable for one-half (1/2) of all damages for such injuries to persons other than employees of either

party, and for one-half (1/2) of all damages for such injuries to property not belonging to either party that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

D. Where, on account of injuries of the character described in the preceding paragraphs of this Article, either party hereto shall make any payments to injured employees or to their relatives or representatives in conformity with (1) the provision of any workmen's compensation act or any act creating a liability in the employer to pay compensation for personal injury to an employee by accident arising out of and in the course of the employment, whether based on negligence on the part of the employer or not, or (2) any plans for employees' disability benefits or death benefits now established or hereafter adopted by the parties hereto or either of them, such payments shall be construed to be damages within the terms of the preceding paragraphs numbered "A" and "B" and shall be paid by the parties hereto accordingly.

E. All claims for damages arising hereunder that are asserted against or affect both parties hereto shall be dealt with by the parties hereto jointly; provided, however, that in any case where the claimant desires to settle any such claim upon terms acceptable to one of the parties hereto but not to the other, the party to which said terms are acceptable may, at its election, pay to the other party one-half (1/2) of the expense which such settlement would involve, and thereupon said other party shall be bound to protect the party making such payment from all further liability and expense on account of such claim.

F. In the adjustment between the parties hereto of any claim for damages arising hereunder, the liability assumed hereunder by the parties shall include, in addition to the amounts paid to the claimant, all expenses incurred by the parties in connection therewith, including costs, attorneys' fees, disbursements and other proper charges and expenditures.

ARTICLE XV

EXISTING RIGHTS OF OTHER PARTIES

If either of the parties hereto has, prior to the execution of this agreement, conferred upon others, not parties to this agreement, by contract or otherwise, rights or privileges to use

any poles covered by this agreement, nothing herein contained shall be construed as affecting said rights or privileges, and either party hereto shall have the right, by contract or otherwise, to continue and extend such existing rights or privileges, and to contract or otherwise make arrangements with others, not parties to this agreement, for the use of any pole covered or not covered by this agreement; it being expressly understood, however, that for the purpose of this agreement, the attachments of any such other party shall be treated as attachments belonging to the party hereto who made such outside arrangement, and the right, obligations and liabilities hereunder of such party hereto in respect to such attachments shall be the same as if it were the actual Owner thereof. Where municipal regulations require either party to allow the use of its poles for fire alarm, police or other like signal systems, such use shall be permitted under the terms of this Article.

ARTICLE XVI

SERVICE OF NOTICES

Whenever, in this agreement, notice is provided to be given by either party hereto to the other, such notice shall be in writing and given by letter mailed, or by personal delivery, to the Chief Engineer of the Electric Company at its office in Miami, Florida, or to the Chief Engineer of the Telephone Company at its office in Jacksonville, Florida, as the case may be, or to such other address as either party may, from time to time designate in writing for that purpose.

ARTICLE XVII

EFFECTIVENESS AND TERMINATION OF AGREEMENT

This agreement shall become effective as of the first day of January, 1960, and shall continue in full force and effect thereafter until terminated insofar as the making of additional attachments is concerned, by either party giving to the other one (1) year's notice in writing of intention to terminate the right of making additional attachments. Any such termination of the right to make additional attachments shall not, however, abrogate or terminate the right of either party to maintain the attachments theretofore made on the poles of the other, and all such prior attachments shall continue thereafter to be maintained in accordance with the terms of this agreement, which agreement shall, so long as said attachments are continued, remain in full force and effect solely for the purpose of governing

and controlling the rights and obligations of the parties with respect to said attachments.

ARTICLE XVIII

ASSIGNMENT OF RIGHTS

Except as otherwise provided in this agreement, neither party hereto shall assign or otherwise dispose of this agreement, in whole or in part, without the written consent of the other party; except that either party shall have the right to mortgage any or all of its property, rights, privileges and franchises, or lease or transfer any of them to another corporation organized for the purpose of conducting a business of the same general character as that of such party, or to enter into any merger or consolidation. In case of the foreclosure of such mortgage, or in case of such lease, transfer, merger or consolidation, its rights and obligations hereunder shall pass to such successors and assigns. Subject to all of the terms and conditions of this agreement, either party may permit any corporation conducting a business of the same general character as that of such party, and with which it is affiliated, to exercise the rights and privileges of this agreement, in the conduct of its said business. For the purpose of this agreement, all attachments maintained on any pole by the permission as aforesaid of either party hereto shall be considered as the attachments of the party granting such permission, and the rights, obligations and liabilities of such party under this agreement, in respect to such attachments, shall be the same as if it were the actual Owner thereof.

ARTICLE XIX

WAIVER OF TERMS OR CONDITIONS

The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall remain at all times in full force and effect.

ARTICLE XX

EXISTING CONTRACTS

All existing agreements between the parties hereto for the joint use of wood poles upon a rental basis within the territory

covered by this agreement, are, by mutual consent, hereby abrogated and annulled.

ARTICLE XXI

SUPPLEMENTAL ROUTINES AND PRACTICES

Nothing herein shall preclude the parties to this agreement from preparing such supplemental operating routines or working practices as they mutually agree to be necessary or desirable to effectively administer the provisions of this agreement.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed by their respective officers thereunto duly authorized, on the day and year first above written.

FLORIDA POWER & LIGHT COMPANY

Witnesses:

Elaine Schoenrock

Diane Scanlon

By: _____
Vice President

Attest: _____
Secretary

Seal

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

Witnesses:

_____

_____

By: _____
Vice President & General Manager

Attest: _____
Secretary

Seal

APPROVED AS TO FORM AND LEGALITY

GENERAL ATTORNEY

THIS SUPPLEMENTAL AGREEMENT, made this 1st day of March 1969, by and between Florida Power & Light Company, a corporation of the State of Florida, hereinafter called the "Electric Company", and Southern Bell Telephone and Telegraph Company, a corporation of the State of New York, hereinafter called the "Telephone Company";

WITNESSETH, that,

WHEREAS, the parties hereto made a Joint Use Pole Agreement, dated the 1st day of May, 1961, covering the joint use of certain of their poles located in the State of Florida; and

WHEREAS, the parties hereto, now desire to amend said Agreement above referred to in the particulars hereinafter set forth;

NOW, THEREFORE, the parties hereto, for and in consideration of the premises and mutual covenants herein contained, do hereby, for themselves, their successors and assigns, covenant and agree as follows:

1. That Article VI C (6) which reads as follows: "Whenever, in any emergency, the Licensee replaces a pole of the Owner, the Owner shall reimburse the Licensee all costs and expenses that would otherwise not have been incurred by the Licensee if the Owner had made the replacement; and the Owner shall deliver to the Licensee a pole of equal height and strength as that used in the replacement."

is hereby changed to read:

Whenever, in any emergency, the Licensee replaces a pole of the Owner, the Owner shall reimburse the Licensee all costs and expenses that would otherwise not have been incurred by the Licensee if the Owner had made the replacement and the Owner shall reimburse the Licensee the current in-stores cost of such replacement poles, plus the applicable store handling charges.

2. That, except as herein amended by this Supplemental Agreement, said Agreement dated the 1st day of May, 1961, shall remain in full force according to its terms, and this Supplemental Agreement shall not be deemed to make any change in said Agreement except such change as is specifically set forth herein.

FLORIDA POWER & LIGHT CO.

By _____
Vice-President

ATTEST:

_____
Assistant Secretary

WITNESS:

_____

_____

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

By _____
Vice President and General Manager

APPROVED AS TO FORM

ATTORNEY

~~ATTEST:~~

_____

WITNESS:

_____

_____

PUBLIC VERSION

EXHIBIT F, EEI-BELL REPORT

Reports of Joint General Committee

of

Edison Electric Institute

and

Bell Telephone System

on

Physical Relations Between Electrical Supply and Communication Systems

REISSUED

JULY 1945

Additional copies of this report may be obtained by Power Companies from the Edison Electric Institute (Publication No. M5) and by Associated Bell Companies from the Department of Operation and Engineering of the American Telephone and Telegraph Company

REPORTS OF
JOINT GENERAL COMMITTEE
of
EDISON ELECTRIC INSTITUTE
and
BELL TELEPHONE SYSTEM

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PRINTED IN U. S. A.

JOINT GENERAL COMMITTEE
OF
EDISON ELECTRIC INSTITUTE
AND BELL TELEPHONE SYSTEM

New York, July 9, 1945.

MEMBER COMPANIES OF E.E.I.

ASSOCIATED COMPANIES OF BELL SYSTEM:

For a number of years the following reports of the Joint General Committee of the NELA and Bell Telephone System have formed a satisfactory basis for the coordination of the electrical facilities of electric supply companies and communication facilities of the Bell System.

Principles and Practices for the Inductive Coordination of Supply and Signal Systems — December 9, 1922.

Principles and Practices for the Joint Use of Wood Poles of Supply and Communication Companies — Feb. 15, 1926.

Allocation of Costs Between Supply and Communication Companies — October 15, 1926.

The supply of copies of the original issue of these reports has been exhausted and accordingly they have been reprinted. In this reissue the three reports have been included under a single cover. A few editorial changes have been made which involve no change in substance.

H. B. Bryans

W. H. Sammis

E. C. Stone

Edison Electric Institute Representatives

M. R. Sullivan

K. S. McHugh

Bell System Representatives

JOINT GENERAL COMMITTEE

The Principles and Practices which are now being reissued under a single cover have, during the past two decades, contributed greatly to the successful operations of the power and telephone industries, and because they have promoted cooperation between these industries, they have benefited the general public. It seems appropriate in connection with this reissue to review the development of these Principles and Practices however, for brevity, omitting mention of all but the original organization.

Previous to 1921, structural and inductive interference problems were giving rise to increasing numbers of controversies between Bell Telephone Companies and Power Companies throughout the country. Early in 1921, therefore, a group of power and telephone men met to discuss the possibilities of a basis for an engineering solution of the problems concerned. Mr. Owen D. Young presided at that meeting and there was formed the Joint General Committee of the National Electric Light Association and Bell Telephone System with the following membership:

Messrs. O. D. YOUNG, *Chairman*,
General Electric Company,

R. H. BALLARD,
Southern California Edison Company,

M. R. BUMP,
H. L. Doherty & Company,

H. M. BYLLESBY, Represented by R. F. Pack,
H. M. Byllesby & Company,

J. J. CARTY,
American Telephone and Telegraph Company,

BANCROFT GHERARDI,
American Telephone and Telegraph Company,

E. K. HALL,
American Telephone and Telegraph Company,

L. H. KINNARD,
The Bell Telephone Company of Pennsylvania,

MARTIN J. INSULL,
Middle West Utilities Company,

ROBERT LINDSAY,
Cleveland Electric Illuminating Company,

BEN S. READ,
The Mountain States Telephone and Telegraph Company,

PAUL SPENCER,
United Gas Improvement Company,

GUY E. TRIPP,
Westinghouse Electric & Manufacturing Company,

M. H. AYLESWORTH, *Secretary*,
National Electric Light Association,

Messrs. Bump, Pack and Gherardi were designated as an Engi-

neering Subcommittee representing both interests with instructions to classify the types of situations in which engineering or technical conflicts were arising. They selected a committee of engineers whose instructions were to proceed with a classification of the types of problems concerned under two divisions (a) those for which a standard had been accepted by both parties and (b) those for which there were no existing standards. Their further instructions were to approach the various problems in the broadest possible spirit of cooperation, with the double objectives of the removal of causes of friction and the early development of mutually satisfactory practices. This committee of engineers consisted of Messrs. H. P. Charlesworth, S. P. Grace, H. S. Osborne and H. S. Warren, representing the Bell Telephone System and Messrs. W. J. Canada, A. E. Silver and F. H. Lane, representing the NELA. Mr. H. L. Wills later succeeded Mr. Canada.

The Engineering Subcommittee in its first report found that the National Electrical Safety Code provided an acceptable guide to practice for problems involving crossings, conflicting construction and jointly occupied poles, and recommended, as to parallel construction, general principles pointing the way to the satisfactory solution of specific cases. After further work the subcommittee prepared the more comprehensive reports which are generally known as the Principles and Practices, and which with minor editorial changes are reproduced in this booklet.

Early in its work the Engineering Subcommittee found that there was need for mutually acceptable technical data to aid in the solution of both electrical and structural coordination problems. Accordingly, the Joint Subcommittee on Development and Research was organized in 1923. Its factual reports have greatly facilitated the solution of coordination problems by the power and telephone companies and have enabled them to arrive at sound engineering answers to the new problems which have accompanied advances in the power and communication arts.

FOR THE

INDUCTIVE COORDINATION OF SUPPLY AND COMMUNICATION SYSTEMS

Scope.

These principles and practices are intended to apply to all new installations, extensions and reconstructions and to the maintenance, operation and changes of all communication and supply systems where inductive coordination may be required now or later to prevent interference with the rendering or providing of supply or communication service.

PRINCIPLES

Duty of Coordination.

(a) In order to meet the reasonable service needs of the public, all supply and communication circuits with their associated apparatus should be located, constructed, operated and maintained in conformity with general coordinated methods which maintain due regard to the prevention of interference with the rendering of either service. These methods should include limiting the inductive influence of the supply circuits or the inductive susceptiveness of the communication circuits or the inductive coupling between circuits or a combination of these, in the most convenient and economical manner.

(b) Where general coordinated methods will be insufficient, such specific coordinated methods suited to the situation should be applied to the systems of either or both kinds as will most conveniently and economically prevent interference, the methods to be based on the knowledge of the art.

Cooperation.

In order that full benefit may be derived from these principles and in order to facilitate their proper application, all utilities between whose facilities inductive coordination may now or later be necessary, should adequately cooperate along the following lines:

(a) Each utility should give to other utilities in the same general territory advance notice of any construction or change in construction or in operating conditions of its

facilities concerned, or likely to be concerned, in situations of proximity.

(b) If it appears to any utility concerned that further consideration is necessary, the utilities should confer and cooperate to secure inductive coordination in accordance with the principles set forth herein.

(c) To assist in promoting conformity with these principles, an arrangement should be set up between all utilities whose facilities occupy the same general territory, providing for the interchange of pertinent data and information including that relative to proposed and existing construction and changes in operating conditions concerned or likely to be concerned in situations of proximity.

Choice Between Specific Methods.

When specific coordinated methods are necessary and there is a choice between specific methods, those which provide the best engineering solution should be adopted.

(a) The specific methods selected should be such as to meet the service requirements of both systems in the most convenient and economical manner without regard to whether they apply to supply systems or communication systems or both.

(b) In determining what specific methods are most convenient and economical in any situation for preventing interference, all factors for all facilities concerned should be taken into consideration including present factors and those which can be reasonably foreseen.

(c) In determining whether specific methods, where necessary, shall be wholly by separation or partly by methods based on less separation, the choice should be such as to secure the greatest present and future economy and convenience in the rendering of both services.

Inductive Coordination for Existing Construction.

(a) Utilities operating supply or communication circuits should exercise due diligence in applying coordinated methods, as occasion may rise, in accordance with these principles, to existing construction.

(b) When supply or communication circuits are generally reconstructed, or when associated apparatus is rearranged or added, or when any change is made in the arrangement or characteristics of circuits, the new or changed parts should be brought into conformity with these principles.

Coordinated Locations for Lines.

Utilization of the highways is essential to the economical and efficient extension, operation and maintenance of supply and communication facilities. To avoid unduly increasing the number or difficulty of situations of inductive or other exposure incident to the use of the same highway by two different kinds of facilities, all lines should, in general, be located as follows:

(a) GENERAL LOCATION.

(1) Where the conditions and character of the circuits permit, joint use of poles by communication and supply circuits is generally preferable to separate lines when justified by considerations of safety, economy and convenience, and presuming satisfactory agreement between the parties concerned as to terms and conditions.

(2) Where communication circuits and supply circuits on the same highway are not to occupy joint poles or where either kind of circuit is alone on a highway, all communication circuits should be placed on one side of the highway and all supply circuits should be placed on the other side, so that, as far as practicable, one side of any section of a highway will be available as the communication side and one side as the supply side.

(3) Unnecessary crossings from side to side of the highway should be avoided.

(b) DETAILED LOCATION.

(1) Local Communication Lines.

Where to be located on the same highway with local supply lines, joint use is generally preferable to separate lines, except sometimes in rural districts and except where the character of circuits involved makes separate lines on opposite sides of the highway more desirable.

Where to be located on the same highway with transmission lines, separate lines on opposite sides of the highway are generally preferable unless a large number of service wire crossings would be involved, in which case, joint use or other arrangements may be preferable.

(2) Toll or Through Communication Lines.

Where to be located on the same highway with local supply lines or lower voltage transmission supply lines, separate lines on opposite sides of the highway are generally preferable, unless a large number of service wire crossings would be involved, in which case, joint use or other arrangements may be preferable.

Where proposed for location on the same highway or to follow the same general direction with higher voltage transmission supply lines, cooperative consideration should determine whether such locations should be used, and if so, what specific coordinated methods are necessary. Where to be located on the same highway with higher voltage transmission supply lines, separate lines on opposite sides of the highway are preferable.

(3) Local Supply Lines.

Where to be located on the same highway with local communication lines, joint use is generally preferable to separate lines except sometimes in rural districts and except where the character of circuits involved makes separate lines on opposite sides of the highway more desirable.

Where to be located on the same highway with toll or through communication lines, separate lines on opposite sides of the highway are generally preferable, unless a large number of service wire crossings would be involved, in which case, joint use or other arrangements may be preferable.

(4) Transmission Supply Lines.

Where to be located on the same highway with local communication lines or shorter toll or shorter trunk communication lines, separate lines on opposite sides of the highway are generally preferable unless a large number of

service wire crossings would be involved, in which case, joint use or other arrangements may be preferable.

Where proposed for location on the same highway or to follow the same general direction with longer toll or through communication lines, cooperative consideration should determine whether such locations should be used and if so, what specific coordinated methods are necessary. Where to be located on the same highway with longer toll or through communication lines, separate lines on opposite sides of the highway are preferable.

(5) Avoidance of Overbuilding.

Overbuilding of one line by another should be avoided, where practicable. Where necessary for the two kinds of lines to occupy the same side of a highway, joint use is generally preferable to overbuilding.

(c) Other Rights of Way.

The foregoing principles, although specifically mentioning highways, should also, when applicable, govern situations involving private rights of way near to each other or to highways.

Deferred General Coordination.

While communication or supply lines when alone should conform to general coordinated methods, such lines, pending the incoming or development of the other kinds of lines, may, if deemed economically advantageous, occupy locations or use types of facilities, construction and operating methods other than those conforming to general coordinated methods. However, the location and character of such facilities should be altered when and as necessary to conform to these methods upon the incoming or development of another kind of facility conforming to general coordinated methods.

Special Location and Types.

When coordination of supply and communication lines of particular types cannot be technically and economically established under the methods of coordination covered by these principles, special cooperative consideration should be given to determining what location and type of construction should be established for each line of such type.

PRACTICES

INTRODUCTORY.

These recommended practices supplement, and are intended to be in accord with, the principles given in the foregoing. They are based on experience, and their application, in connection with the principles on "Coordinated Location of Lines" will effectively promote the inductive coordination of supply and communication systems.

In the development of these detailed practices, it has been found advisable to proceed step by step along two well defined subdivisions, namely, practices based on qualitative considerations, and those based on quantitative values. The practices given herewith cover qualitative considerations and form a basis for the later adoption of definite quantitative values where they may properly apply. It is recognized that in the growth and development of the respective utilities and as the development of the art progresses, other satisfactory methods will doubtless be devised. The fact that particular methods are specified herein does not preclude the use of other mutually satisfactory methods, nor their incorporation in these practices as they may be agreed upon.

In order that the above considerations may be carried out it is intended that the joint work on practices will be continued and that additional material will be issued from time to time as it becomes available. In the preparation of these practices, certain factors were encountered which, due to lack of complete information, could not be as fully covered at this time as their importance in inductive coordination merits. Among these factors are included certain features of the protection of communication systems, the selectivity of communication apparatus, the transposing of supply circuits outside of inductive exposures and the question of single versus multiple grounding in supply systems.

In order that the full intent of the principles may be carried out, the practices hereinafter specified as "General Coordinated Methods" should be applied to all communication and supply systems, except as deviations may be made under the principle of "Deferred Coordination." In cases of inductive exposure, where these general coordinated methods are insufficient, such of the practices hereinafter specified as "Specific Coordinated

Methods" should, in addition, be applied as will provide the best engineering solution.

MUTUALLY APPLICABLE PRACTICES

Notice and Cooperation.

Utilities between whose facilities inductive coordination is, or later may become, necessary should each give to the other advance notice of any construction or changes in construction or operation of their respective facilities. The utilities should cooperate in determining and carrying out those methods which provide the best engineering solution in each case, and to this end there should be complete interchange of information.

Limitation of Influence and Susceptiveness.

In designing, specifying or otherwise determining the location, construction and arrangement of supply or communication circuits or the quality, arrangement and suitability of materials or apparatus to be used in, or associated with, communication or supply circuits and in operating and maintaining lines and apparatus, all factors which would contribute to inductive influence or inductive susceptiveness during either normal or abnormal conditions should be limited in so far as is necessary and practicable.

Changes in Systems or Methods.

In changing systems or methods of operation, precaution should be taken to avoid increasing, and an effort made to decrease, if practicable, the influence or susceptiveness. Any abnormal condition which increases these factors should be promptly remedied. If the service requirements prevent a prompt remedy of such condition, effort should be made to reduce these effects by such other methods as are available.

Operating Instructions.

Communication companies should adopt operating instructions, specifically outlining the procedure for notification of supply companies when inductive disturbances arise on toll circuits that appear to be incidental to abnormal power influence and supply companies should adopt operating rules which outline the desirable procedure for their operators during times when a supply circuit is abnormally unbalanced.

Records.

A record should be kept by the communication companies of disturbances on communication circuits, and the supply companies should keep a record of accidental or transient conditions on supply circuits, so that a study of such disturbances which appear to be due to accidental or transient conditions will be facilitated.

Mechanical Construction.

The mechanical design and construction of communication and supply systems should conform to good modern practice.

Maintenance.

Efforts should be made to anticipate and forestall failure of lines or equipment. Defective equipment should not be continued in service and repairs or renewals should be promptly made.

Tree Trimming.

Trees should be trimmed as necessary, due consideration being given clearances to meet weather conditions. Due diligence should be exercised in obtaining permission to trim trees when such permission is needed and such trimming should be done in accordance with good modern practice.

Insulation.

Insulators and insulating material used on communication and supply circuits should be designed, constructed and maintained so as to provide adequate mechanical and electrical strength.

PRACTICES APPLICABLE TO COMMUNICATION SYSTEMS

General Coordinated Methods

The following practices should be applied to all communication systems, except as deviations may be made under the principle of deferred coordination.

Power Level and Sensitivity.

The power level and sensitivity of communication circuits should be, so far as is practicable, designed and maintained at the standard recommended for the class of service involved.

Protection.

Protective devices should be such that they will not interrupt the communication circuits by operating at unnecessarily low voltages or currents.

Protective devices should be, so far as practicable, so designed, constructed and installed as not to unbalance the communication circuits.

The same type of heat coil or fuse should be used in all wires of a circuit.

Reasonable care should be used in the maintenance of all protective apparatus to avoid conditions which will unbalance or interrupt the communication circuits.

Inspections.

Adequate field inspection and routine tests of lines and apparatus should be made with a view to maintaining the electrical balance and efficiency of the circuits.

Discontinuities.

Discontinuities should be limited to the number required by the conditions.

LINES.

In order to minimize line unbalances, the resistance, inductance, capacitance and leakage conductance of one side of a circuit, in each section thereof, should be equal respectively to the corresponding quantities in the other side of the same section of the circuit in so far as is necessary and practicable.

Some of the methods and means which should be followed for the purpose of minimizing unbalance in lines are as follows:

Transpositions.

The capacitances to earth of the two sides of a telephone circuit should be suitably balanced by transpositions. Before a communication line is placed in service, a check should be made to insure that the transpositions are properly installed and correctly located.

Excessive Spacing.

Excessive spacing of conductors should be avoided. This does not mean that the spacing should be less than that required by considerations of safety, service and the future requirements of the circuits.

Derived Circuits.

In the creation of circuits from one or more circuits without adding line conductors, due regard should be given to avoiding unnecessary increases in susceptiveness.

Phantom circuits should be created only from similar adjacent pairs. Branches connected to but one side of a phantom circuit should be avoided unless connected through isolating transformers.

If one side circuit of a phantom group is loaded, the other side should be loaded at the same loading points, such loading to have closely the same electrical characteristics.

Phantom circuits should in general be used only for toll or trunk circuits except in cases of long rural circuits.

Connections.

Effort should be made to prevent the introduction of unbalance by contact resistance.

All joints in toll cables should be soldered or welded. All joints in open-wire toll conductors should be made with sleeves or should be well soldered or welded.

All wires should be properly cleaned to secure good contact before the joints are made.

All test connections, terminal boxes and associated wiring should be designed, constructed, installed and maintained so as to minimize the unbalances of the conductors.

Conductors.

Conductors of the same material and commercial size should be used in the two sides of the circuit at any point.

Ground Return Circuits.

Ground return telephone circuits should not be employed.

Use of Cable.

Consideration should be given to placing circuits in cable at the time of rebuilding heavy open wire subscribers' lines.

APPARATUS.

All apparatus electrically connected to a communication circuit should be so designed, constructed, installed and maintained as to minimize, in so far as is necessary and practicable, unbalance of the series impedance and admittance to earth of the two sides of the circuit.

Some of the methods and means which should be followed for the purpose of minimizing unbalance in equipment are as follows: